

# Australia's Coal Seam Gas Debate: Perspectives across Time, Space, Law and Selected Professions

by

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Submitted in fulfilment of the requirements for the degree of  
Doctor of Philosophy  
of the Australian National University  
January 2018



THE AUSTRALIAN NATIONAL UNIVERSITY

# Candidate's Declaration

This thesis contains no material which has been accepted for the award of any other degree or diploma in any university. To the best of the author's knowledge, it contains no material previously published or written by another person, except where due reference is made in the text.



David James Turton

Date: 18-01-2018

# Thesis by Compilation Declaration

As per the Australian National University policy procedure on ‘Higher degree by research – thesis by compilation and thesis by creative works’, I declare that this thesis is composed primarily of published papers, that the author of this thesis is the sole author of all of these publications, and that the assistance of my PhD supervisory panel members did not extend beyond the usual and expected duties of a PhD supervisor. I acknowledge their contributions to this thesis in terms of editing, suggestions and support in the Acknowledgements within this thesis and in the publications themselves. In all cases, I was responsible for the preparation of manuscripts, responses to referees, selection of journals, correspondence with editors and data collection. The publications that form the basis for this thesis are listed in the Appendices (with the exception of one submitted manuscript) and correspond to the relevant chapters as follows:

Chapter Three - Turton, D.J., 2014. Codifying coexistence: Land access frameworks for Queensland mining and agriculture in 1982 and 2010. *Journal of Australasian Mining History* 12: 172-192.

Chapter Four - Turton, D.J., 2015a. Unconventional gas in Australia: towards a legal geography. *Geographical Research*, 53(1): 53-67, DOI: 10.1111/1745-5871.12101.

Chapter Five - Turton, D.J., 2015c. Lawyers in Australia’s coal seam gas debate: A study of participation in recorded community forums. *The Extractive Industries and Society*, 2(4): 802-812, <<http://dx.doi.org/10.1016/j.exis.2015.06.010>>.

Chapter Six - Turton, D.J., 2017. Legal determinations, geography and justice in Australia’s coal seam gas debate. In: A. Lukasiewicz, S. Dovers, L. Robin, J. McKay, S. Schilizzi and S. Graham (Eds.), *Natural Resources and Environmental Justice: Australian Perspectives*. CSIRO Publishing, Clayton South, Victoria, pp. 155-167.

Chapter Seven - Turton, D.J., submitted manuscript. Fracturing planners: a scoping study of their role(s) in Australia’s coal seam gas debate. Submitted to *Land Use Policy* in August 2017.



David James Turton

Date: 18-01-2018

# Acknowledgements

Much of the research for this thesis was undertaken as a ‘fly-in-fly-out’ PhD student largely based in Cairns, with periodic visits to Canberra. First and foremost, I wish to thank my supervisory team: Professor Stephen Dovers, Dr Thomas Measham and Professor Karen Hussey. Karen provided initial guidance as my principal supervisor until her departure to the University of Queensland in Brisbane at the end of 2015, with Steve then stepping into this role. I am grateful for the support each has given me at various points, from editorial feedback on draft chapters, to encouraging me to present at international conferences and advice on journals and dealing with referee comments.

In the Fenner School, I thank Amy Chen, Cathy Gray, John Boland and Steve Leahy, who put up with my IT and administration questions with boundless patience. Fellow students and friends at Fenner and James Cook University (Cairns Campus) also provided important moral support, advice and useful distractions. In particular, James Langston, Rebecca Riggs, Edison Salas Castelo, Mohammed Alamgir, John Doolan, Lokes Brooksbank, Anna Lukasiewicz, Tina Marton, Sonya Duus, Monique Retamal and Megan Evans all helped to ensure that I wasn’t completely caught up in my thesis as I rotated back and forth between two cities. Outside of ANU, Leonie Woodruff, Bec Fleming and Luke Drever deserve special mention for tolerating all my thesis-related conversations and correspondence over the years. They gave me endless encouragement, comments on draft papers, opportunities to explore Canberra’s culinary and bushwalking attractions, a place to stay on occasion, and a sympathetic ear for my thesis frustrations.

I wish to particularly thank the interviewees for their candid remarks and time, their thoughtful responses to my questions often given under time-pressures. Their enthusiasm convinced me of the value of examining CSG through the eyes of key professions. Scott Riley and Manus Basson (Isaac Regional Council) were invaluable during fieldwork at Moranbah and I thank the Council for providing free accommodation during my week there. For access to documentation and photographs, I extend my thanks to the Queensland Local Government Association and the Logan City Council. I am also grateful to Dr Sharon Harwood (James Cook University, Cairns Campus) for improving my understanding of planners and for her ideas on how to reach potential interviewees. My former honours supervisor and friend, Dr Jan Wegner (James Cook University, Cairns Campus), gently reminded me of the dangers of thesis procrastination and happily listened to my progress over afternoon tea.

I am most appreciative of financial assistance I received to conduct this research. The Australian Government supported this project through an Australian Postgraduate Award and the Fenner School of Environment and Society (ANU) generously granted me a Supplementary Scholarship.

Finally, I extend my heartfelt gratitude to my parents Steve and Wendy, and brothers, Geoffrey and William. My parents have endured the vast majority of my thesis angst with humour and no small amount of tolerance. Dad has also read and critiqued much of my thesis and acted as my ‘fourth supervisor’ in many ways – assisting with fieldwork, discussing research methods, suggesting conferences I should attend and much more. Likewise, Mum has listened to practice runs for conference presentations, proofread manuscripts and passed along helpful media coverage on CSG. Geoffrey and his partner James Woodbury have been strong supporters of my research and my ‘stories’, ensuring that I had fun during many research visits to Brisbane and Sydney.

# Abstract

Coal seam gas (CSG) extraction is a source of ongoing controversy in the Australian States of New South Wales and Queensland. Primarily composed of methane, CSG has evolved from a gas extracted in the interests of coal miner safety, to a profitable concern, source of electricity generation and, arguably, a transition fuel in a carbon-constrained future. Efforts to develop Australia's CSG industry since the early 2000s has brought the sector into increased geographical proximity with existing land uses. Arguments over CSG and its potential risks and benefits remain ongoing, yet the nation's CSG debate often lacks historical context, geographical insights, justice research perspectives and viewpoints from key professionals associated with this resource. This thesis therefore poses the overarching question: how can environmental history, legal geography, procedural and distributive justice, and profession-specific insights from lawyers, judges and planners, shed light upon this controversial resource?

Drawing on a typology of relevance for environmental history, current CSG land access conflicts in Queensland are contextualised within past efforts in that State to promote coexistence between grain growers and coal miners, comparing the State's statutorily enshrined Land Access Code 2010 with a voluntary Explorer-Landholder Procedures Guide produced in 1982 by agricultural and mining stakeholders. Building on this temporal aspect of formal and informal land access agreements, a legal geography lens is taken to unconventional gas in Australia, highlighting its value as a tool for investigating CSG – particularly for investigating the involvement of lawyers and judges in land use disputes.

Acknowledging that lawyers are multifaceted participants in Australia's CSG discussion, an extended study of their participation in recorded community forums in Queensland and New South Wales demonstrates this profession's significant role in informing community forum audiences about land access laws concerning CSG, while also critiquing these laws by referring to personal experiences with the legal process. Viewpoints from judges associated with CSG-related litigation were also sought out and framed by both legal geography and procedural and distributive justice. An examination of a selection of court judgments concerning CSG revealed that procedural and distributive justice issues have arisen in New South Wales and Queensland. These judgments attend to the place of Australian local governments in negotiations with CSG operators, the provision of accurate mapping information to landholders by CSG companies and the nature of effective engagement in community consultation. Judges were also shown to engage with geographical concepts in their rulings, namely scale.

Finally, this thesis examines planners in Australia's CSG controversy. Advancing research into the roles and self-perceptions of planners through interviews with planners in New South Wales and Queensland and related documentary sources, these professionals were found to be flexible in their approach to the industry, adopting community advocate, facilitator of development and social gatekeeper roles as needed. The discussion and findings of this research

pose important questions about CSG and the multifaceted impacts of this unconventional fossil fuel – stressing the utility of analysis that is informed by space, law, history, justice and the expertise of professionals.

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# Chapter 1: Introduction

Coal seam gas (CSG) is an unconventional fossil fuel primarily composed of methane (Williams *et al.*, 2012). Initially deemed a hazard and ‘waste gas’ to be disposed of for the safety of underground coal miners, it was not until the late 1970s, with the advent of improved extractive technologies in the form of hydraulic fracturing and horizontal drilling, that CSG began to be considered as an economic possibility. Increasingly viewed as advantageous for electricity generation and a viable alternative to more conventional fuel sources (such as coal and oil), the expansion of CSG exploration and exploitation in Australia since the early 2000s has brought the industry into regions with higher population densities and created overlap with non-mining land uses, namely agriculture and pastoralism. Perceived as both a boon and risk on economic, environmental and social grounds in rural and regional Australia, particularly in the eastern states of New South Wales and Queensland, CSG has become increasingly controversial since the creation of the national anti-CSG social movement Lock the Gate in 2010.

This thesis delves into several facets of CSG in Australia, in an attempt to overcome a tendency by CSG social science researchers to focus their efforts at the local/community/level, with an emphasis on community impacts and social protest against the industry (e.g. Colvin *et al.*, 2015; Hendriks *et al.*, 2016). While this growing literature is part of an international trend (e.g. Schafft *et al.*, 2014; Jacquet, 2012; Brasier *et al.*, 2011) and has obvious value for exploring different CSG impacts at local/regional scales, risk perceptions and community attitudes towards unconventional gas development more generally (e.g. Grubert and Skinner, 2017; Bec *et al.*, 2016; Luke *et al.*, 2014; Sherval and Hardiman, 2014; Ennis *et al.*, 2013) – it ignores other aspects of Australia’s CSG discussion relating to land access issues (and historical precedents for contemporary approaches to managing land access conflict), the potential of legal geography as a tool for investigating Australia’s CSG controversy, the extent to which distributive and procedural justice issues arise in CSG-related litigation, and finally, the parts played by lawyers and planners in this national discussion.

The purpose of this introduction is to briefly explain the substantive chapters that follow, each of which address an aspect of the overarching research question of this thesis: **how can environmental history, legal geography, procedural and distributive justice, and profession-specific insights from lawyers, judges and planners, shed light upon this controversial resource?** To answer this larger research question, the chapters that follow are based on the below sub-questions:

- How might historical attempts to promote accommodation between coal mining and grain growing interests in Queensland in the early 1980s be of use to contemporary efforts to reduce land use conflict over CSG under the Queensland Land Access Code 2010?
- In what ways might the disciplinary enterprise known as legal geography be of value as a tool for understanding Australia’s CSG debate?

- As presenters at recorded community CSG forums, how do lawyers contribute to Australia's CSG discussions and community understandings of this resource?
- What do court judgments reveal about the procedural and distributive justice challenges of the CSG industry?
- As a profession which deals with multiple interacting land uses, what roles do Australian local and state government planners have in the nation's CSG deliberations?

Australia's CSG debate is a complex one and in taking an approach that embraces several facets of this discussion, the researcher acknowledges that the thesis chapters which follow are inevitably partial in their focus. This is an inherent challenge for researchers examining unconventional gas worldwide (Haggerty, 2017). The overarching research question and the sub-questions above are in no way intended to be the final word on the analysis of Australia's CSG discussion, but do represent this researcher's attempt to explore CSG in a manner that moves beyond polarisation. They are, however, an attempt to explore CSG in a novel fashion. The sub-questions proposed are both a response to identified silences in the social science literature relating to CSG in Australia – as mentioned above – and the result of research preferences and data collection obstacles encountered by the researcher during the preparation of this thesis, noting that no research is ever conducted in a vacuum (Bradshaw and Stratford, 2005). Notwithstanding several limitations on this research, to be discussed in chapter two, the approach presented in this thesis also permits some understanding of the intricate ways in which CSG is bound up in Australian landscapes and society more generally. By using insights from legal geography, environmental history, distributive and procedural justice, and drawing on profession-specific viewpoints from lawyers and planners, this thesis distinguishes itself from much of the existing social science literature examining unconventional gas internationally – while also making use of the findings from this literature where relevant in the individual chapters that follow.

As stated in the Thesis by Compilation Declaration, the structure of this thesis is based upon four publications produced during the researcher's PhD candidature and one submitted manuscript to the *Land Use Policy* journal – also arising from research conducted for this PhD. Those chapters that have been published are reproduced in their journal format in the Appendices and are referred to throughout this thesis. Likewise, the submitted manuscript (chapter seven) is also referred to at various points in this thesis – although as an unpublished manuscript, it is not listed in the Appendices. As a result of different journal requirements, referencing styles vary in the chapters, particularly where a journal has required footnotes for referencing – but other journals have requested use of the Harvard system. Consequently, to allow quick examination of references in the paper 'Codifying coexistence: Land access frameworks for Queensland mining and agriculture in 1982 and 2010' (see chapter three and Turton, 2014), endnotes in the final

published version have been converted to footnotes for ease of reading. The structure of the thesis that follows is detailed below.

### **Dissertation Structure and Outline**

The researcher has written this thesis primarily as standalone chapters. Chapters three, four and five have been published in peer reviewed journals (Turton, 2014, 2015a, 2015c). Chapter six has been published as a peer reviewed book chapter (Turton, 2017) and chapter seven has been submitted to the *Land Use Policy* journal (Turton, submitted manuscript - current status as August 2017). As a result, some necessary overlaps between the chapters have occurred, particularly in the legal geography-themed chapters (chapters four, five and six). In addition to references being provided at the end of each substantive chapter, a consolidated reference list is given at the end of this thesis.

The chapters appear as follows:

#### Chapter Two

In this chapter the researcher provides a thesis contextual statement of the aims and findings of the PhD overall. An indication of research findings for each of the chapters is given, with links made between the various publications and the submitted manuscript produced in this thesis. Particular attention is paid to explaining the various lenses used at different points in this research in the form of a methodology section, which sets out why and how the researcher's focus shifted over time. Over the course of four and a half years, the researcher's approach to examining Australia's CSG debate evolved from exploring this issue from within the framework of a typology of relevance for environmental history, to then embrace the concept of legal geography and its application to unconventional gas, community CSG forums and the multi-faceted involvement of lawyers at these events and CSG generally, some of the procedural and distributive aspects of CSG as revealed in court determinations, and finally the roles of Australian planners in CSG debates. An extended discussion of the research methods used in this thesis is laid out, noting that although links are made between the content and themes of the chapters, this methodology section is also partly a personal narrative by the researcher to explain their evolving methodological choices and shifting interest in the thesis topic over four and a half years. In the absence of traditional thesis' literature review and methods chapters, this chapter overviews literature and methods, while relevant and more detailed material on both are located within the ensuing papers/chapters (especially chapter five and chapter seven).

#### Chapter Three

This chapter details a comparative case study of the Queensland Land Access Code 2010 and the historical Explorer-Landholder Procedures Guide 1982, negotiated between the Queensland Chamber of Mines and the Queensland Grain Growers Association. The purpose of

this chapter is to highlight the potential for environmental history to cast light upon past attempts at accommodation between competing land uses, so that contemporary efforts at reducing landscape conflict over CSG, through instruments such as the Land Access Code, can be contextualised and perhaps improved upon.

#### Chapter Four

Turning to the contributions of legal geography, this chapter provides an overview of then current CSG issues facing Australia, arguing that legal geography might be a useful means of contributing constructively to Australia's CSG discussion – with an emphasis on legal actors and the role of 'social licence' in contractual arrangements between CSG operators and individual landholders.

#### Chapter Five

Drawing on some legal geography ideas from chapter four, this chapter considers the participation of Australian lawyers at recorded community CSG forums – noting their 'translator' role in answering the questions of community members and framing these as legal arguments. Presenter motivations for participating at community forums were also considered. These forums were regarded as informal engagements between lawyers and the community, entailing the expression of views about CSG which blended descriptions of the legal process with personal reflections of that process from key legal actors.

#### Chapter Six

This chapter brings notions of procedural and distributive justice together with legal geography to investigate judicial opinions concerning CSG. Finding that both distributive and procedural justice issues have arisen in the existing litigation which has arisen around CSG, this chapter also explores the capacity of judges to drive improvements in company-community interactions in the realm of CSG – sometimes using geographical concepts, such as scale, to achieve this. It also acknowledges that judges are cognisant of the wider community debate that surrounds CSG, but contend that their involvement does not extend beyond the legal questions posed by this resource.

#### Chapter Seven

The views of Australian local and state government planners are explored in this chapter, in an effort to consider the opinions of professionals who are embroiled in a wide range of land use challenges that reach far beyond CSG. Deploying research into the self-perceptions of planners, this chapter demonstrates that the profession is flexible in their response to CSG – embracing the roles of technical expert, facilitator of development, community advocate and social gatekeeper as needed to navigate jurisdictional limitations, pro- and anti-CSG political positions from local governments and evolving stakeholder concerns.

Although elaborated on in chapter two's methods section, it is important to acknowledge from the beginning that the researcher's decision to focus on the above issues in the relevant

chapters is a consequence of an evolving research approach, one that commenced with an interest in exploring CSG land access issues through an environmental history lens. Subsequent exposure to legal geography literature in the course of researching and writing chapter three (see Turton, 2014: 185, 192n) brought about a shift in the researcher's focus and ultimately led to CSG research being conducted in this sub-field and accordingly included in this thesis (chapter four, chapter five and chapter six – see Turton, 2015a, 2015c and 2017). In the course of exploring the contributions of lawyers and judges to Australia's CSG debate (Turton, 2015a, 2015c and 2017), the researcher determined that a study of planners could illuminate Australia's CSG conversation, because the researcher believed that members of this profession would perhaps be more likely to frame CSG as a land use with both unique challenges and striking similarities to other contentious resources – with which they had professional experience as a result of their role in land use decision-making. Beyond researcher preferences and an evolving research focus, there were other reasons for the directions taken by the researcher over the course of their thesis candidature – including access to interviewees, limited resources and the recognition of gaps in the CSG social science literature. These are discussed below in chapter two in the methodology section.

As evidenced by the chapters that follow, the primary contribution of this thesis lies in the sub-field of legal geography, with secondary contributions to environmental history, distributive and procedural justice in CSG-related litigation, and the perspectives of planners. Although the chapters address different facets of Australia's CSG controversy, each sub-question contributes to the overall research aim of extending current understandings of Australia's CSG debate. There are also links between the sub-questions both in terms of theme and subject matter. For example, land access concerns are considered in chapters three and five – albeit that the former is predominantly focused on historical land use disputes, while the latter deals primarily with contemporary challenges. Land access disputation also appears as an aspect of chapter six in a litigation context. Similarly, legal professionals, namely lawyers and judges, are referred to in chapters four, five and six. At their most basic level, chapters three, four, five, six and seven all involve CSG stakeholders – with each chapter delving into how particular groups and individuals have involved themselves with this resource. This thesis is not an exhaustive representation of the wide range of stakeholder activity associated with the CSG sector. But this dissertation highlights the fact that a contentious land use can be better understood through a variety of perspectives that have so far remained under-explored in the social science literature.

In taking this multi-pronged approach to the overarching research question, this thesis addresses noticeable gaps in the CSG literature while also giving attention to related issues not specifically pertaining to the above research questions – these include the historical involvement of Australian universities in CSG research and the not-so novel suggestions put forward to combat community complaints about CSG. While not central to the ideas presented in this thesis, they do serve to highlight some of the ways in which this contentious resource can be understood in wider

Australian society and emphasise historical linkages between CSG companies and the nation's research institutions. These matters are considered below in chapter two.

## Chapter 2: Thesis Contextual Statement

### Introduction

This thesis examines aspects of Australia's coal seam gas controversy through the lenses of environmental history, justice and legal geography – with an emphasis on links between historical and contemporary land access frameworks for mining and agriculture, distributive and procedural justice issues discussed by judges in court cases, and the perspectives of lawyers and planners – the former in the context of recorded community forums, the latter's viewers being sourced through semi-structured interviews and documentary material. In addressing these facets of Australia's coal seam gas debate, this thesis draws upon theoretical models in environmental history, social justice and legal geography, taking a mixed methods approach to data collection – archival materials, audio-visual sources (e.g. MAAK Lawyers, 2016), interviews and publicly accessible media. It should be stated from the outset that this thesis is not intended to be a legal treatise of the industry, but rather uses the law as a means of framing selected aspects of the sector in Australia. A brief explanation of Australia's coal seam gas debate follows, before the purpose of this thesis contextual statement is given.

Coal seam gas (CSG), also known as coalbed methane, is an unconventional fossil fuel (primarily composed of methane) and a source of contention for communities, governments and industry in many parts of the world. Arguments about the various possible economic, social and environmental harms and benefits of CSG can be found in a variety of sources. The CSG industry has received support from some governments, partly as a result of being viewed as an important transition fuel to less carbon-intensive forms of energy (namely coal and oil) (e.g. Stephenson *et al.*, 2012; Vickas *et al.*, 2015). A naturally occurring resource found in underground coal seams (generally 300 to 1000 metres below the surface), CSG can be used in electricity generation or compressed and transported via pipelines for domestic use or export purposes (Stammers, 2012). The production of CSG entails the drilling of wells into coal-containing strata, with groundwater being brought to the surface, so that a coal seam can be depressurised and thereby permit methane to escape from the coal underground (Monckton *et al.*, 2017). It should be said from the outset that CSG is not a new industry in Australia, with exploration commencing in May 1976 in the State of Queensland – when approval was given for the granting of Authorities to Prospect 226P, 231P and 233P to Houston Oil & Minerals of Australia Inc (Keogh, 2013; Scott, 1999; Australian Gas Association, 1996). The development of the industry was aided by the successful transfer of extraction technology initially developed for use in the United States (McKanna, 1992). By 1999, over 200 CSG wells were drilled in Queensland, with substantial spending devoted to gas exploration and appraisal (Scott, 1999). This development was not without land use conflict. At a broader level, policy headaches experienced in Queensland during the 1990s and early 2000s by those attempting to accommodate overlapping coal mining and CSG tenures serve as another

indication of connections between conventional and unconventional fossil fuels across time and space in Australia (Matthew, 2005; Johnston, 2001; Matheson, 1999). This history also emphasises that land use conflicts over CSG have historically involved more than gas, pastoral and agricultural interests.

Since 2009, the CSG industry has expanded rapidly in Australia, primarily in the State of Queensland (Luke, 2017) – which has adopted a ‘go grow’ approach to the industry’s development, one that emphasises a ‘learning by doing’ approach to policies that advance the sector (Cronshaw and Grafton, 2016). The neighbouring State of New South Wales, by contrast, has favoured a ‘go slow’ approach to the industry, one which has relied upon a series of regulatory frameworks to manage risks relating to the industry. This regulatory response has slowed the sector’s rollout in rural regions of New South Wales and also reduced the geographical footprint of CSG in this jurisdiction, in the aftermath of community protests, litigation and buybacks of CSG exploration licences by the State Government (Luke, 2017; Cronshaw and Grafton, 2016). The above regulatory responses are partly a response to stakeholder criticisms of the CSG sector. Community concerns surrounding CSG have included high water consumption in areas prone to prolonged periods of drought, farmers’ access to land being impeded by CSG-related infrastructure, the disposal of saline water arising from CSG extraction processes, the prospect of cumulative impacts from the industry and an uneasiness with the merits of CSG production as a response to anthropogenic climate change (Tan *et al.*, 2015; Lloyd *et al.*, 2013).

Against the background of these community concerns, social movement activism has also played a role in Australia’s CSG debate, with the establishment of a national anti-CSG organisation, Lock the Gate, in 2010 – a body composed of farmers and environmentalists (Colvin *et al.*, 2015). Such risks and community protest are counterbalanced by the socio-economic potential of the CSG industry, which may include an increase in the income of local areas during construction, additional employment opportunities as the population increases, new infrastructure and government revenue (Measham *et al.*, 2016; Office of the Chief Economist, 2015). Social opposition to CSG can be found not only in the work of Lock the Gate, but also regional groups, such as CSG Free Northern Rivers and Save Liverpool Plains, among others – as relayed through both the popular media (Lacey and Lamont, 2014) and some CSG-related litigation (Turton, 2017, chapter six). Given recent attention on gas supplies and claims of looming shortages in Australia (e.g. Australian Competition and Consumer Commission, 2016; Australian Petroleum Production and Exploration Association, 2016b; MacDonald-Smith, 2016), it seems likely that CSG will be a source of anxiety, argument and aspiration for some time yet.

Despite a growing social science literature on the subject of CSG and various aspects of Australia’s debate around this resource, as evidenced above, there remain significant gaps and silences in relation to CSG that can and should be subject to greater attention from researchers. For all the valuable social science research devoted to themes of social protest against the CSG industry (Colvin *et al.*, 2015; Hendriks *et al.*, 2016), social licence (Curran, 2017; Luke, 2017;



Lacey and Lamont, 2014), socio-economic impacts of the industry (Towler, *et al.*, 2016; Measham *et al.* 2016), legal challenges posed by the sector (Swayne, 2012; Randall, 2012) and community-level case studies of CSG (Everingham *et al.*, 2015; Lloyd *et al.* 2013), scholarship examining Australia's CSG debate as a whole lacks a number of reference points that could serve to extend the scope of analysis used to explore this controversy. These include: past land use conflict, the interplay between legal and spatial considerations in framing CSG conflicts, the part played by lawyers in explaining and translating community concerns around CSG at community events, the place of distributive and procedural justice in CSG litigation as interpreted by members of the judiciary, and the manner in which planners understand their role in Australia's CSG discussion at local and state government levels. This thesis finds that each of these lenses has the potential to contribute to a fuller understanding of a still-unfolding land use conflict, while also complementing the types of research efforts already being undertaken in Australia (and elsewhere) by researchers across a range of disciplines. As noted above in chapter one, this thesis asks: how can environmental history, legal geography, procedural and distributive justice, and profession-specific insights from lawyers, judges and planners, shed light upon this controversial resource? This overarching research question is by its very nature interdisciplinary. This is partly a recognition by the researcher that Australia's CSG debate is capable of being understood through different disciplines, and also an appreciation that a range of approaches are necessary to explore the multitude of impacts CSG has upon Australian society. Combining multiple disciplinary cultures can be a useful exercise in attempting to address multifaceted problems such as CSG, biodiversity decline and climate change (Crowley *et al.*, 2014). That CSG exhibits the characteristics of a 'wicked problem' has been pointed out by both scholars and those in the communities concerned (Uhlmann *et al.*, 2014; New South Wales local government planner interviewee #6) – suggesting that an interdisciplinary approach is warranted. The researcher acknowledges that this may still be insufficient, given the complexity of CSG – with one human geographer from the United States recently pointing out 'how difficult it is to understand the full impact of the shale [gas] revolution...[and stressing] that we [as researchers] are almost necessarily limited in our ability to conceive natural gas in its full complex role in the world' (Haggerty, 2017: 68).

This thesis contextual statement is therefore designed to introduce themes and concepts discussed in each of the chapters and related published articles to follow. In the course of research, these chapters have been published or have been submitted for publication, as indicated in the Thesis by Compilation Declaration, the Introduction, at the commencement of each relevant chapter and in the Appendices. This statement also attempts to consolidate these publications. Nonetheless, there are some variations in the text to account for knowledge gained following the publication of research results and to provide further insights into specific points with the lifting of publication constraints on word limits. Such an approach also allows for related issues to be discussed, such as trust between stakeholders and social licence in other case studies, beyond that

surveyed in the original article. Providing a means of linking the various lenses used on this topic by the researcher, this statement will survey in turn: the methods deployed in the various thesis chapters, the relevance of historical precedents to contemporary land access arrangements between mining and agricultural industries, the value of legal geography as a means of shedding light upon unconventional gas (UG) more generally in Australia (UG encompassing not only CSG, but also shale gas and tight gas), the contributions of lawyers to Australia's CSG debate, the significance of procedural and distributive justice questions to some of the judicial findings relating to CSG in Australia, and the many and varied roles performed by planners in attempting to navigate Australia's CSG controversy. Before considering the substantive issues raised in the chapters to follow, some methodological discussion is required. In addition, an explanation is given for the researcher's overall approach to this contentious topic – in the form of a personal narrative. This also provides a means of integrating the themes of the various chapters, as briefly noted in chapter one.

### **Methods**

The research undertaken in this thesis was largely exploratory in nature, with research methods evolving over the course of four and a half years to embrace environmental history, legal geography and distributive and procedural justice – as the researcher was exposed to new theoretical insights and different types of source material. A range of methods were deployed over the course of the thesis to research the various chapters. Commencing the thesis in early 2013, the researcher initially approached CSG with an eye to contrasting contemporary land access issues arising from this sector with past experiments at accommodating diverse land uses – drawing to some extent upon undergraduate training in history and law. The researcher was also troubled by what appeared to be a public debate where historical context was absent. After reading about disputes involving grain growers and coal miners in Queensland in the early 1980s – in a wide-ranging article about coal that also referred to CSG (Duus, 2013) – the researcher tentatively sought out more information in an electronic (and subsequently physical) search at the Queensland State Archives in Brisbane. In keeping with what others have described as 'an openness to discovery' (Roche, 2005: 135), the researcher sought to add context to the identified 1980s episode under discussion by examining other attempts at producing voluntary frameworks to manage the use of landscapes in more recent times. Some creative thought was required to frame the raw materials found in the Queensland State Archives by relating them to other contemporary material. This was achieved by examining other documentary sources relating to Queensland's Mining Act 1982 and conflict between grain growers and coal miners from the 1980s – namely mining and agriculture industry journals, parliamentary debates, newspapers, relevant secondary material and academic literature from the period in question (see the footnotes of chapter three and the endnotes of Turton (2014) for more information). The researcher also investigated the scholarly literature for similar instances of cooperation between land users. This is standard practice for historical research that involves the use of archival sources (Roche, 2005).

The researcher's decision to write a contrasting case study of the voluntary 'Explorer-Landholder Procedures' Guide from 1982 and the present-day Queensland Land Access Code 2010 was made after the archival documents were analysed – when similarities between the Guide and Code became apparent to the researcher. The researcher took these similarities as an opportunity to compare CSG land access issues with coal and grain conflict in Queensland nearly thirty years before. A typology of environmental history (Dovers, 2000a, 2000b) became the theoretical basis for the analysis of the two documents, which also involved examining a 2012 review of the Land Access Code. This ultimately resulted in chapter three (Turton, 2014). The historical link between coal and CSG emerged again for the researcher in chapter seven (Turton, submitted manuscript), albeit as part of a larger study involving planners.

During the writing-up phase of chapter three (Turton, 2014), the researcher became aware of the sub-field of human geography known as legal geography – after reading an Australian survey on the subject (Bartel *et al.*, 2013). While this study was referred to in chapter three (Turton, 2014: 185, 192n) in a brief point about legislative change and evolving societal values, legal geography became the researcher's 'home discipline' – appearing in most subsequent chapters (Turton, 2015a, 2015c, 2017 – see chapters four, five and six). For the purposes of this thesis, legal geography is understood to be a mode of inquiry that 'maps the social relations and spatiality of law' (Correia, 2017: 1823). It is further defined as **'a stream of scholarship that makes the interconnections between law and spatiality, and especially their reciprocal construction, into core objectives of inquiry'** (Braverman *et al.*, 2014: 1).

In the course of preparing the manuscript that became Turton (2014, see chapter three), the researcher came to the conclusion that the Queensland Land Access Code (2010) and the Explorer-Landholder Procedures Guide (1982) were examples of formal and informal legal geographies. While the stakeholders differed, both documents were an attempt by key individuals in stakeholder bodies to accommodate land uses in the jurisdiction of Queensland. In both cases, attempts were made by stakeholders to capitalise on the goodwill created by these land access frameworks, with industry and government each casting an eye to future cooperation amid changing land use demands. Reflecting upon chapter three and the thesis overall, in hindsight, it is clear to the researcher that themes of compromise, conflict, coexistence, accommodation and negotiation permeate other published aspects of this thesis. Notwithstanding the lack of legislative endorsement by the Queensland Government at the time, the formulation of the 1982 'Explorer-Landholder Procedures' Guide as an industry-endorsed, voluntary document might also be seen as an example of an informal agreement between stakeholders (Turton, 2014, chapter three) – and perhaps constitute a legal geography of its own. During the research for chapter three, the researcher learned of the disciplinary enterprise known as legal geography – and more specifically the efforts of Australian scholars in this stream of scholarship (Bartel *et al.*, 2013). These researchers acknowledge that legal geography's brief extends beyond 'formal' laws to encompass interactions with 'informal customs and lore, social conventions and norms, religion and dogma,

as well as the economy’ (Bartel *et al.*, 2013: 346). As a result, legal geography can be used to analyse both informal socio-legal engagements concerning CSG (such as community forums that involve the participation of lawyers, see Turton, 2015c and chapter five) and formal discussion of CSG-related court judgments (e.g. Turton, 2015a, 2017 – see chapters four and six respectively). Therefore, it is reasonable to argue that the Guide’s informal nature was nonetheless an example of legal geography created between interested stakeholders to enable improved access to resources – albeit in a voluntary capacity.

Having been introduced to legal geography, the researcher commenced a literature survey, to determine whether or not such a sub-discipline could be used to frame the analysis of Australia’s CSG debate and thus the thesis as a whole. Taking a broader view of the resource, to include shale and tight gas in Australia, this chapter took ideas from the existing corpus of legal geography research to construct a survey of the literature, to showcase how legal geography could be used to explore different aspects of the CSG controversy (Turton, 2015a, chapter four). This was done primarily to convince the researcher of the merits of legal geography as a research lens for CSG. The research method used to construct this chapter involved a combination of searching for relevant academic literature (primarily from geographical and legal periodicals), some case law (located using the term ‘coal seam gas’ in the Australasian Legal Information Institute’s database, i.e. AustLII), and press coverage – where geographical concepts such as scale were discussed. A small local case study from Mount Mulligan in Far North Queensland was also included in that study, due to the researcher’s proximity to the then proposed CSG exploration site, subscription to a local Lock the Gate email list, and the researcher’s attendance at one community meeting in Cairns relating to the proposal in mid-2014. Significant works from legal geography (e.g. Andrews and McCarthy, 2014; Haas, 2008b) and the wider academic and popular literatures surrounding CSG were also incorporated into this chapter where relevant (e.g. Cleary, 2012; Manning, 2012).

The recent publication of legal geography research, particularly several pertinent chapters in *The Expanding Spaces of Law: A Timely Legal Geography* (Braverman *et al.*, 2014), assisted the researcher in situating some of the primary source material (news coverage of CSG, legislation and court cases) within broader literature trends. Although initially intended purely as a review of the UG literature from a legal geography standpoint, the chapter/paper ultimately embraced a range of documentary sources (court judgments, legislation and press reports) that helped to strengthen the researcher’s argument that legal geography could be employed as a device for examining Australia’s CSG debate – particularly after peer review. Beyond convincing the researcher that a legal geography lens could be used to investigate CSG and therefore to continue exploring CSG through the lens of legal geography, what began as a section on ‘legal practitioner perspectives’ in chapter four (Turton (2015a: 58-59), would also become the impetus for the next stage of thesis research: an examination of lawyers and Australia’s CSG debate.

Initially intended to be a study informed by interviews with lawyers about CSG, chapter five (Turton, 2015c) suffered in the first instance from a lack of access to informants from all sides of the CSG discussion in New South Wales and Queensland. Lawyers from the industry, government and non-government/environmental organisations were all approached via email for interview, to no avail. Although two interviews were conducted with legal academics with expertise in the area of CSG (ethical approval was obtained from the Australian National University for those interviews, protocol number 2014/433), the researcher recognised that this was an insufficient sample and modified the research method. Having observed that Jaspal *et al.* (2014b) had used Youtube videos in their analysis of the benefits and risks of UG, the researcher began to consider the possibility of exploring the opinions of lawyers in online media concerning CSG – as an alternative to interviews. This proved to be an effective approach, revealing six recorded community forums with lawyer presenters, which, when combined with relevant documentary and contextual sources to account for CSG industry voices, allowed the chapter to take shape. While it is true that other CSG community forums were held, the researcher was only able to locate six recorded CSG forums with lawyers acting as presenters – this should not suggest that lawyers for industry and other parties involved in Australia's CSG debate were uninvolved in non-recorded fora with community, government and industry representatives – however information about these events was difficult to locate beyond pre-event advertising (as noted in Turton, 2015c, chapter five). Universities and environmental non-government organisations were prominent in this study in terms of facilitating spaces to conduct CSG community forums (Turton, 2015c: 803-804), but it is difficult to speculate on their significance due to the small sample of fora available to the researcher. Nonetheless, it is worth noting that two of these were conducted outside of the two primary jurisdictions examined in this thesis (New South Wales and Queensland), specifically Victoria (Centre for Rural Regional Law and Justice Deakin University and the Environmental Defenders Office, 2014) and South Australia (Conservation Council SA, 2011). The notion of lawyers as translators from the legal geography research of Martin *et al.* (2010) was previously referred to by the researcher in Turton (2015a, chapter four) and became the theoretical framework to analyse lawyer comments made to community forum audience members. This framework was chosen because it appeared to be a useful means of exploring community questions about CSG and lawyer presenter answers to those queries.

A detailed methodology of this chapter is contained in Turton (2015c, chapter five), but it is stressed that although lawyers were reluctant to speak with the researcher directly, it became clear from the documentary and audio-visual sources that lawyers were actively communicating with other parties about their work – within the limits of their professional obligations to their clients. This suggests a possible misunderstanding/miscommunication of the intent of the research, possibly leading to a lack of response – which may be worth considering in the future in any similar research. It is also evident that not all lawyers are uneasy about speaking with university researchers, as Kennedy's (2017) environmental justice research traversing UG and mineral

resource development in Australia and the United States demonstrates. Her case studies contain interviews with several lawyers from non-government organisations, including public interest environmental lawyers (Kennedy, 2017). This stakeholder group is also prominent in the community forums discussed in chapter four (Turton, 2015c), indicating at least a receptiveness to communicating with members of the public – if not always academic researchers.

Having come across court judgments in the course of researching chapter four (Turton, 2015a), the researcher recognised that at some stage attention would need to be paid to this source material. The opportunity to do so arose in October 2015, when the researcher was invited to participate in a two-day workshop entitled ‘Justice, fairness and equity in natural resource management’, hosted by the Fenner School of Environment and Society at the Australian National University. This workshop gave rise to a book, with the researcher’s presentation – ‘Legal determinations, geography and justice in Australia’s coal seam gas debate’ - becoming a chapter in the book *Natural Resources and Environmental Justice: Australian Perspectives* (Turton, 2017, chapter six). Data for this chapter was sourced through a search of online legal databases: Austlii (mentioned above), New South Wales CaseLaw and the Supreme Court Library of Queensland. Search terms used in these databases to source case law included: ‘coal seam gas’, ‘CSG’, ‘seam gas’ and ‘methane drainage’ and ‘coal seam gas mining’. The researcher justified the selection of court cases presented in Turton (2017, chapter six) on the basis of a word limit restriction demanded by the publisher, the availability of other contextual/documentary sources to ‘flesh out’ the court judgments for a non-legal audience, and the presence of geographical concepts in the judgments themselves. The researcher’s decision to examine the case law that surrounds CSG (see chapter six, Turton, 2017) also necessarily meant that the jurisdictions of New South Wales and Queensland were the focus for analysis – as these states both had existing case law on CSG, whereas all other Australian jurisdictions lacked a corpus of existing case law on CSG at the time of writing (this was confirmed through an examination of Australian legal databases, including the Australasian Legal Information Institute, during the preparation of chapter six, Turton 2017). It might be expected that this could change over time, with consequences for the conclusions reached in Turton (2017).

For example, a CSG judgment which was delivered after the publication of (Turton, 2017; chapter six) – *QGC Pty Limited & Ors v Eugenehans Peter Vogt & Anor* (2017) – represents the first compensation determination made under Queensland’s *Petroleum (Production and Safety) Act 2004* in recent years. It is also the first judgment of its type since the expansion of the Queensland CSG industry to support liquefied natural gas exports (Plumb and Lomas, 2017). Beyond the courtroom, compensation arrangements remain understudied in CSG analyses, receiving only sporadic media attention and academic comment by those examining negotiation and valuation arrangements that exist between CSG operators and landholders (e.g. QGC, 2016; Smail, 2016; ABC News, 2015o; Claughton, 2015; Willacy, 2014; Fibbens *et al.*, 2014b; Anonymous, 2013c). Compensation agreements have also been praised for providing cash flow

to further investment in farming infrastructure – with flow-on economic benefits to rural and regional communities (Anonymous, 2015a; Anonymous, 2014b). Compensation aspects of CSG are a significant subject, not only for its potential to improve the terms of negotiation between CSG operators and communities, but also because of the risks of diminished land values, disruption to economic activities (such as pastoralism) and the privacy concerns of landholders (Measham et al. 2016). As international research has shown, further research will be required to comment accurately on the nature of compensation agreements reached between CSG companies and landholders – posing confidentiality challenges for researchers (Bugden *et al.*, 2016). Compensation takes many forms and CSG has its supporters in rural and regional Australia, who view the industry as an economic and social opportunity (e.g. Anonymous, 2014a). Those who favour the exploitation of CSG on financial grounds include at least some local governments – institutions that welcome the prospect of increased revenue in rates from CSG operators (Turton, submitted manuscript, chapter seven; Turton, 2017, chapter six; ABC News, 2016; Anonymous, 2015c; Burton, 2015). However, local governments may face significant challenges when attempting to capitalise on any CSG windfalls, including a lack of expertise and staff resources to respond to environmental impact statements (ABC News, 2015n, 2015o; KPMG, 2015).

Procedural and distributive justice issues from a selection of CSG court cases were chosen by the researcher in an attempt to encompass some of CSG's challenges (including its geographical dimension), and also to explore the notion of fairness in the regulatory processes that govern its operation. In this context, procedural justice is defined for the purposes of chapter six (Turton, 2017) as a concern revolving around 'the perceived fairness of decision-making processes' (Gross, 2014: 26). Distributive justice focuses on how and where 'goods are distributed in society' (Gross, 2014: 24) – prompting energy justice researchers to consider 'where energy injustices emerge in the world' (Jenkins *et al.*, 2016: 175).

While other forms of justice could certainly be considered in an analysis of CSG case law (e.g. environmental justice), the researcher took the view that as the primary focus of analysis was on court judgments, attention to procedural justice in a litigation context and distributive justice issues facing a local government authority in a CSG-affected region were the most appropriate avenues through which to explore CSG and some of its legal geography components. An environmental justice approach, while valid, would not have encompassed those CSG court cases that addressed non-environmental aspects of CSG in their findings. The researcher acknowledges that different forms of analysis will certainly offer different interpretations of the extant CSG case law (for a contrast with the *Metgasco* judgment discussed in Turton, (2017, chapter six), see Curran's (2017) analysis, informed by social licence). The existing Australian case law at the time of writing also limited the scope of analysis undertaken by the researcher. To counter the small sample size of CSG court cases used in the chapter, reference was made to both domestic and international commentary on UG litigation trends – to enable the interested reader to follow-up on judgments not otherwise discussed in the chapter.

Planners, the subject of chapter seven (Turton, submitted manuscript), were selected by the researcher for two reasons. First, the profession had made a brief appearance in Turton (2015a, chapter four) and the researcher considered that more could be learned about their involvement with CSG with greater attention to other documentary sources – namely conference papers, articles in professional planning journals and CSG news coverage more broadly. Second, it seemed to this researcher that planners were comparatively ‘untouched’ by social scientists examining UG – although present in North American literature, the comments made by these professionals in interviews were usually bundled in with other types of professionals, preventing an articulation of planner-specific views (see chapter seven and Turton, submitted manuscript for more information on the literature relating to this point). By 2016 the researcher was increasingly conscious of interview fatigue, with several ongoing research projects being undertaken into community responses to CSG. An initial search suggested that the remarks of planners did not appear to be particularly visible in any of the published academic literature relating to CSG, with only limited use of their expertise in interviews in unpublished planning dissertations (see chapter seven; Turton, submitted manuscript). Planners were also of interest due to their exposure to multiple types of land use – extending beyond CSG. The researcher also recognised that in some ways these professionals were legal geographers in their own way: individuals operating within legal frameworks and attempting to resolve spatial challenges.

Semi-structured interviews were conducted intermittently with planners throughout much of 2016, following approval from the Australian National University Human Research Ethics Committee (protocol number 2016/052) – a requirement now common to most socio-legal research (Boon, 2005). Fortunately, this second attempt at securing interviews with professionals associated with CSG was more successful than the initial effort to speak with lawyer interviewees. A mixed methods approach permitted the inclusion of planners’ voices from documentary sources, while the semi-structured nature of interviews helped to allay the concerns of some informants who were anxious about the potential content of questions. Although both approaches used to explore planner perspectives on CSG were obviously partial (Czarniawska, 2014), and constrained by time limitations and the financial resources of the researcher, it enabled a number of additional insights to be made in chapter seven, particularly those relating to early government interest in CSG and its links with coal. Providing questions to interviewees in advance helped to alleviate the concerns some held about speaking to a university researcher about such a contentious topic, while also permitting greater reflection from some informants where time permitted (this included providing documents to the researcher to support their comments) (Dunn, 2005).

The decision to allow interviewees to choose whether or not to be identified by name was made in light of the human ethics options presented on the consent form provided by the Australian National University. In most cases, interviewees did not wish to be named, but by providing the option, an interviewee could decide for themselves either before or after an



interview was concluded. For those who wished to be identified by name, there appeared to be a view that their opinions and involvement in CSG issues were widely known, and in some cases already on the public record by way of news coverage and authorship of articles in industry planning journals (see chapter seven, Turton, submitted manuscript for particulars). Others were of the opinion that if they were willing to make statements about CSG on the record, they should ‘have the courage of their convictions’ by putting their name beside their remarks. Local/state government planner interviewees were mostly employed in either New South Wales or Queensland, although several local government planners had worked for multiple local government areas within a state – occasionally being involved in CSG matters in different local government areas. By contrast, consultant planner interviewees had generally performed work for the CSG industry in both jurisdictions – although given the small number of consultant planners who agreed to be interviewed (three), this should not be seen as a generalisation of employment patterns in the CSG sector. A snowball sampling method was used to locate interviewees, supplemented by approaches to non-government organisations and a planner academic (who emailed details of the research to members of their professional network on behalf of the researcher). This approach permitted a wider range of views than what otherwise might have been possible, given the risk of similarly-held views accumulating in studies that utilise the snowball approach to secure interviews (Dunn, 2005). A fuller discussion of the research methods used is contained in chapter seven (Turton, submitted manuscript), but as a final observation, the political environment may have aided the researcher’s efforts to obtain interviews with planners in New South Wales. Approaches were made to prospective interviewees in that state in mid to late 2016, following a retreat from New South Wales by the CSG industry – in the aftermath of community protests, legal challenges, licence buybacks and compensation payments to industry (e.g. Curran, 2017; Connor, 2016). With the physical presence of the industry reduced in New South Wales, some informants may have been more willing to discuss their CSG experience with the researcher.

More generally, this thesis draws largely upon publicly available documentation. This material was sourced from a variety of institutions, including the Queensland State Archives, the National Library of Australia, the Queensland State Library, James Cook University Library and various repositories located at the Australian National University and the University of Queensland. Some photographs and unpublished reports were also provided to the researcher with the kind permission of local government and non-government organisations: namely the Queensland Local Government Association, Logan City Council and the Isaac Regional Council. Newspaper coverage on the CSG controversy has been extensive, with electronic databases aiding in the search for relevant material – particularly Factiva, Newsbank, the National Library of Australia’s Trove digitised newspapers database and Google News. While not without limitations and risks of bias (as with any source, e.g. ABC Media Watch, 2014), journalists provide researchers with valuable glimpses into the actions and possible motivations of various parties involved in CSG deliberations. The information relayed by the Australian press, and the level of

informant access that underpins it, is undoubtedly useful for researchers given that CSG is subject to a variety of sensitivities.

Articles written by those with a direct association with CSG have also proven helpful and additional perspectives were obtained from government reports, parliamentary debates, submissions to government inquiries (e.g. P&E Law, 2016), online audio-visual materials, legal literature (e.g. Levin, 2016; Gately, 1997), legislation, court judgments, commentary from industry journals (e.g. Hill and Armstrong, 1991; Scott, 1993a, 1993b), interviews with local/state government and industry consultant planners, and conference proceedings (e.g. Barker and Heron, 1992; Bocking and Weber, 1991). Fieldwork was also conducted at Mount Mulligan and Moranbah in Queensland. While both localities feature in published and submitted manuscripts from this thesis (Turton, 2014, 2015a, submitted manuscript – see chapters three, four and seven), photographs taken by the researcher during physical site visits were not included in articles submitted for publication – but are nonetheless referred to below.

Mixed methods have been employed throughout this thesis, however, as should be clear from the information presented above, the particular topic of a manuscript/future thesis chapter often lent itself to one form of source material over another, as the researcher's focus shifted over time from land access matters in contemporary and historical perspective, to legal geography questions and finally to the viewpoints of key professionals in relation to CSG – lawyers, judges and planners. The researcher's decision to examine professionals rather than geographical areas was a deliberate decision to shift the focus of analysis (commonly used in other CSG social science literature, e.g. Bec et al., 2016; Sherval and Hardiman, 2014) from a particular region or community to that of individuals holding particular roles in Australia's CSG debate. There are limitations to such an approach, including a lack of informant access (mentioned above), but there are also opportunities to examine CSG in ways not normally considered by researchers. The challenge of locating cooperative informants to discuss a controversial land use in the midst of ongoing community-level research efforts by social scientists in Queensland and New South Wales led this researcher to consider a profession-focused approach to interviews. Planners were judged from the documentary sources to be a group less likely to have been previously targeted for interviews about CSG and therefore possibly more willing to grant the researcher one. The documentary sources relating to planners and CSG in New South Wales and Queensland also demonstrated to the researcher that their perspectives would be sufficiently diverse so as to present a range viewpoints about the sector (see chapter seven, Turton, submitted manuscript). As made clear in chapter seven, other professions could certainly have been examined by the researcher (e.g. valuers, engineers and geologists), but the researcher's focus on lawyers, judges and planners was a result of an evolving research process that came to oscillate around the law and legal actors associated with CSG.

The jurisdictions of Queensland and New South Wales were selected by the researcher in part because of the relatively plentiful news coverage devoted to CSG during the thesis

candidature, particularly during the period of 2013-2015. Because this thesis makes extensive use of open-access media reporting on CSG to supplement other sources (particularly interviews, court cases, legislation, audio-visual materials, archival records and government reports), New South Wales and Queensland represented jurisdictions that contained a broad range of stakeholder perspectives for analysis. A sufficient number of documentary sources from those jurisdictions also showcased how understandings of CSG have evolved in Australia over time. As the thesis progressed, the researcher noted how ‘flashpoints’ around CSG emerged in other Australian jurisdictions – notably Western Australia, the Northern Territory and Victoria – and these are referred to in various ways throughout the thesis. Another reason for focusing on New South Wales and Queensland was the existence of a growing number of social science studies relating to CSG, providing important context with which to situate the researcher’s empirical data. Likewise, the presence of a number of older secondary sources concerning CSG in New South Wales and Queensland assisted the researcher in expanding on key points derived from primary sources.

As will be discussed in the Conclusion, there are a number of future research challenges and opportunities for those wishing to explore CSG in Australia in greater depth and it is acknowledged that this research is not without limitations. This issue is elaborated on in the Conclusion, where reference to current gas shortage anxieties and suggestions for future research are also made. The research direction described by the researcher is above all a personal reflection on the methods adopted to conduct this research – it is not designed to be a ‘throughline’ for aspiring CSG social scientists, but rather provides snapshots of one researcher’s intellectual trajectory over the course of their thesis candidature and the methods deployed to obtain the data that underpins that document. Further methodological comment is contained in the individual chapters that follow.

### **Content and themes of chapters**

Commencing with an examination of the Queensland Land Access Code 2010 (‘the Code’), chapter three (see Turton, 2014) takes an historical lens to this document, by comparing and contrasting the Code with an earlier effort at mining and agricultural coexistence – a voluntary Explorer-Landholder Procedures Guide (‘Guide’), jointly developed by the Queensland Chamber of Mines and the Queensland Grain Growers Association in 1982. This effort to manage mining and agricultural interactions through the Guide arose partly from the spread of weeds and other land use disturbances as a consequence of coal exploration activities in grain growing areas. This episode of conflict and attempted accommodation also falls within a wider historical context, being symptomatic of emerging tensions between coal mining operators and agricultural producers in Australia from the 1980s onward (Duus, 2014, 2013).

The above historical episode also illustrates a contemporary trend of industry striking agreements with primary producers which do not have statutory force, with the recent signing of a Principles of Land Access agreement in New South Wales, among AGL, Santos, Cotton

Australia and the state Irrigators Council. The agreement reached is designed to grant the landholder the right to refuse drilling for CSG on their land. Notably, however, the agreement does not extend to the right to refuse the development of infrastructure associated with the CSG industry on a farmer's property – namely power lines, roads and pipelines (Herbert, 2014b). For the CSG company Metgasco, however, the issue of access has been interpreted differently, as the right of the farmer to say 'yes' to drilling operations 'without being harassed [by third parties]' (Quoted in ABC News, 2014e).

Exploring both the Guide and Code through a typology of relevance for environmental history (Dovers, 2000a, 2000b), the paper arising from this research (Turton, 2014, see chapter three) argued that this historical attempt at accommodation between grain growers and coal miners in Queensland in the 1980s holds relevance to the modern-day Code and Dovers' typology of relevance for environmental history in three ways. First, it serves as a contextual example of both land use conflict and past efforts to obtain some form of coexistence between stakeholders – thereby demonstrating that balancing competing land uses is not new. Second, the Guide arguably acts as an historical baseline, drawing attention to how stakeholders respond to voluntary land use frameworks, in comparison to those enforced through legislative provision. Third, this comparative case study offers at least one means of reframing some stakeholder perceptions of the Code – as revealed through a 2012 government review of the document – thus potentially reaching into Dovers' third category of relevance for environmental history: a direct policy lesson (Dovers, 2000a, 2000b).

It is important to emphasise that the Guide is only one example of the type of trust, cooperation and consultation that is possible between groups often seen as engaged in perpetual conflict. By way of example, future historians might find value in examining BHP Cannington's decision to allow the North Queensland Conservation Council to appraise its environmental management practices in the semi-arid Mitchell grasslands of north-west Queensland. The Council's 2000 report into the Cannington zinc, lead and silver operation was a first for Australian conservation groups and was especially unusual given the Council's initial fears that their engagement with BHP would lead to 'corporate capture'. That this was overcome through a self-described combination of 'Fervour, Expertise, Awareness [and] Time' deserves further attention (Haigh, 2001: 3; North Queensland Conservation Council, 2000; Haigh and Roche, 2001). The concept of trust is also gaining currency as a subject worthy of historical study in its own right (Dickenson, 2008) and is seen as a crucial element in the present-day creation of social licence and community acceptance of a company's operations (Bennetto, 2013). With this in mind, current commentary on land access and mining operations in Queensland was utilised both to understand the impact of public opposition to CSG extraction and to explore a review of the Land Access Code – a document that hints at its usefulness in preventing disputes and the extent of compliance (Queensland Government, 2010a, 2010b; Queensland Land Access Review Panel, 2012; Queensland Government, 2012; Bodenmann, *et al.*, 2012; Swayne, 2012; Galloway, 2012;

Weir and Hunter, 2012; Plumb and Letts, 2011). For further details, see Turton (2014) and chapter three.

Beyond Dovers' typology of relevance for environmental history, acknowledgement of the historical progression of CSG in Australia is worth investigating as a means of establishing the links between CSG and coal mining. A historically-grounded understanding of CSG can also serve to provide contextual background to the involvement of key professionals in CSG disputes. For example, the fact that a New South Wales state government planner saw fit to comment on the potential for conflict between CSG, coal mining and projected urban expansion at Macarthur South, southwest of Sydney, in the early 1990s indicates that CSG is not a new phenomenon for some members of the planning profession (Sullivan, 1991). Indeed, as shown below, in addition to their contemporary expertise and experience with this industry (e.g. Turnbull, 2015; Robinson, 2014a, 2014b; Duncan-Jones, 2012), Australian planners at local and state government levels have pondered the implications of this industry in earlier times (see Turton, submitted manuscript – see chapter seven).

That historical research can aid those investigating contemporary energy systems has been acknowledged by others (Hirsh and Jones, 2014) and this would appear to apply equally to contemporary land access frameworks for CSG operators and other land users – in addition to past and present connections between the coal sector and CSG industry in Australia (Black, 2011; BHP Engineering Pty Ltd, 1997). Although some historians and geologists have sought to shine a light on selected aspects of the CSG saga in Australia, at the time of writing, there is no comprehensive historical study of the nation's myriad of associations with CSG – despite some tentative efforts (Towler *et al.*, 2016; Keogh, 2013; Scott, 1999). While this thesis is not an attempt to redress this, it does give attention to historical context when relevant. An historical lens may also help to contrast shifting contemporary social attitudes in local communities with those held in the past. An example of this in the coal and CSG context can be found in the Queensland city of Ipswich. Once a premier coal-mining centre, the Ipswich City Council – in line with some other Australian local governments – formally resolved to oppose all coal mines in the region, including the expansion of existing mines and CSG applications. As one Ipswich councillor explained: 'Even though we're a city with a proud mining history...it's time these activities are wound down and certainly in relation to coal seam gas' (Tlozek, 2015). While the Council's resolution has no legal effect – as mining development approvals are decisions for the State Government – the Queensland Mines Minister, Dr Anthony Lynham, observed that:

The [Queensland] Government is aware and understand the Ipswich City Council's interest in the coexistence of mining and Ipswich residents as the city has expanded...Departmental officers have met with council and undertaken to consult them before any coal permits are renewed...[It was] unlikely that any new land would be released for coal exploration in the Ipswich City area (Tlozek, 2015).

Beyond land access arrangements, history has proven to be an alluring device for some media commentators when remarking upon the contested nature of CSG, with one journalist arguing that the CSG industry would do well to remember the legacy of Leon Davis in its efforts to maintain a social licence with the Australian community. In 1995, Davis, then a managing director for CRA Limited (now known as Rio Tinto), publicly embraced a new relationship with Indigenous communities at a time of political turmoil in the aftermath of the Australian High Court's *Mabo* decision in 1992 – stating: ‘Let me say bluntly...CRA is satisfied with the central tenet of the Native Title Act’ (Quoted in Stevens, 2015: 34). That both the National Farmers’ Federation and the Australian Mining Industry Council actively campaigned against the recognition of native title is a matter of historical record (Ritter, 2009; Mercer, 1997), with at least one commentator arguing that a parallel exists between the contemporary divisions of CSG and those created by the recognition of Indigenous native title rights in the 1990s:

Not since the schism of the native title debate have extractors and their communities been as worryingly divided. The drivers of division are more diverse and their triggers more easily and directly disseminated than they were in the pre-digital 1990s. The Davis legacy says the first step to recover the welcome necessary to get on with business is to acknowledge its contribution to fracturing of community consensus then find the courage, vision and voice to lead enduring rehabilitation of the industry's standing (Stevens, 2015: 34).

As others have shown, history is a tool that can be used by both proponents and opponents of UG to advance claims about the merits and risks of the sector in local contexts (Kroepsch, 2016; Towler, *et al.*, 2016; Keogh, 2013). Given that landscapes play host to a variety of meanings and societal aspirations, competition and conflict of some description is to be expected. Freyfogle explains this relationship succinctly, albeit in the context of the United States: ‘The land reflects not just what people have done but who they are, what they understand, what they value, and what they dream’ (2007: 1). It is therefore important to recognise that legal geography has both spatial and temporal components, which may indeed be inseparable - as others have noted (Braverman, 2010; Blomley, 2014b). As Pasqualetti and Brown have pointed out: ‘[G]eography is not the lone social science interested in energy. Historians, economists, sociologists, anthropologists, lawyers, architects, planners – to name but a few – all contribute to our understanding’ (2014: 123). It is also worth remembering that beyond UG, legal geography scholarship has addressed the interconnectedness of time and space in studies ranging from the regulation of fishing, to mining legislation and race relations (Wiber, 2009; Haas, 2008b; Delaney, 1998). In addition, questions of land tenure have long fascinated Australian historical geographers, with legal geography matters being pursued in all but name by some scholars in this sub-discipline (for an overview of their contributions, see Holmes, 2014, 2000). Historians may also benefit from taking a legal geography slant on past case studies of private property and contests over competing values (O’Gorman, 2016).

Legal geography is premised on the notion that law and space are mutually constitutive (Pruitt, 2014) and has been defined as ‘a stream of scholarship that makes the interconnections

between law and spatiality, and especially their reciprocal construction, into core objects of inquiry' (Braverman *et al.*, 2014: 1). Legal geography is distinct from forensic geography: the former principally concerned with interpreting the law, the latter dealing with the roles and opinions of geographers as expert witnesses in specific cases (Brodsky, 2003). As previously stated above, this thesis approaches legal geography as a sub-field of human geography that 'maps the social relations and spatiality of law' (Correia, 2017: 1823). More than this, legal geography is understood in this thesis to be fundamentally about the ways in which the law is 'located, takes place, is in motion, or...[can be examined through] some [form of] spatial reference' (Braverman *et al.*, 2014: 1).

In recent decades, legal geography scholarship has accrued rapidly, generating a number of articles, books, edited collections, special issues, workshops, conference papers and related courses (for one recent overview, see Braverman *et al.*, 2014). An exhaustive literature review of this booming intellectual project is not possible here, suffice to note that legal geography has been brought to bear across a range of sectors, jurisdictions and subject matter. A plethora of research exists and includes, but is certainly not limited to: supervised injecting facilities for drug users (Prior and Crofts, 2016; Williams, 2016), arsenic poisoning in Bangladesh (Atkins, *et al.*, 2006), biodiversity law reform (Bartel and Graham, 2016), the public trust doctrine and water in California (Cantor, 2016), disability discrimination law (Vellani, 2013), skateboarding in urban areas (Carr, 2010), young people (Collins and Kearns, 2001), the geostationary orbit (Collis, 2009), transboundary water supplies (Forest, 2006-2007), conservation easements (Kay, 2016), electronic waste production (Lepawsky, 2012) and coastal climate change adaptation (O'Donnell, 2016). Researchers have also begun to explore legal geography in non-Western, non-common law settings, including the protection of wetlands and property rights in Cambodia (Gillespie, 2016a, 2016b) – to some extent addressing calls to expand the scope of legal geography research in these areas (Delaney, 2017; Kedar, 2014).

Unconventional gas has not escaped the attention of legal geographers either, as research in the United States and Australia demonstrates (Turton, 2017, 2015a, Turton, 2015c – chapters four, five and six; Hesse *et al.*, 2016; Andrews and McCarthy, 2014). As the literature survey provided by Turton (2015a, see chapter four) was published prior to the appearance of Hesse *et al.* (2016), it is worth noting that their work builds upon Andrews and McCarthy (2014) by attempting to explore the shifting political ecology of shale gas extraction in Pennsylvania. Emphasising the concepts of enclosure and exclusion to illustrate the socioecological dimensions of shale gas development in the United States and biofuel production in India, Hesse *et al.* called for:

[S]ustained engagement between political ecology and legal geography to show how legal discourse and the materiality of resources coproduce spatial relationships and configurations of power, with broader ramifications for the study of justice within energy transitions (Hesse *et al.*, 2016: 653-654).

Laws influence the manner in which energy resources are used by societies around the world (Paterson, 2012). As a result, human geographers, while not necessarily adopting an explicit legal

geography approach to UG questions, have examined a variety of governance and territorial issues associated with natural gas in Europe (Bouzarovski *et al.*, 2015), Latin America (Hinojosa *et al.*, 2015; Bury and Bebbington, 2013), Australia (e.g. Haslam McKenzie, 2013), Africa (Symons, 2016) and elsewhere. Oil and gas reserves in federalist systems of government are the subject of an entire volume of jurisdictionally-specific studies from scholars in a range of fields from around the world (see generally Anderson, 2012). Efforts have also been made to conceptualise the various positive and negative socioeconomic consequences of unconventional fossil fuel extraction (Measham *et al.*, 2016), with several studies examining the governance challenges posed by UG in developing countries, including the significance of legal institutions (Paylor, 2017; Corrigan and Murtazashvili, 2015). It is worth noting that the strength of legal institutions and social capital in developed countries may likewise have a bearing on the regulation of mining operations in these countries – with regional variations in the administrative competence and institutional environment of developed nations (Söderholm and Svahn, 2015).

The relationship between law, power, space and gas is prominent in many studies – with some authors drawing on disciplinary traditions related to legal geography, such as economic and energy geography, in making their arguments (e.g. Anejionu *et al.*, 2015; Apple, 2014; Durfee, 2014). In view of the contentious debate around the techniques used for UG extraction, including ‘fracking’ (itself a loaded term imbued with negative connotations and both actual and alleged social, economic and environmental impacts, see Evensen *et al.*, 2014), it has been suggested that rural geographers have an important role to play in exploring ‘the intersection of resource development, social and economic justice and multi-scalar governance’ (Argent, 2017). Legal geography could prove useful to rural geographers in exploring this intersection, with an eye to the influence of the law in rural areas subject to resource development. In addition to sites of CSG extraction, there may also be opportunities for legal geographers to explore knowledge gaps in Australia’s CSG debate by investigating the global production networks that underpin natural gas, perhaps by taking a cue from economic geographers (Bridge and Bradshaw, 2017).

Comparative research potential between UG researchers in Australia and elsewhere is also raised in Turton (2015a, see chapter four). Some UG social scientists engage with spatial and legal matters in comparative perspective, but do not explicitly refer to legal geography when doing so. Domestic research in this regard can be found in attempts to contrast the CSG regulatory regimes of New South Wales and Queensland (Cronshaw and Grafton, 2016; Brockett, 2014b). In addition to differences in population density in areas of high CSG extraction (Queensland’s being higher than that of New South Wales), actions taken by Lock the Gate to prevent operators from accessing CSG resources are illegal in Queensland – but not in New South Wales (*Petroleum (Production and Safety) 2004* (Qld), s 805; Cronshaw and Grafton, 2016). Queensland’s position contrasts sharply with the State of Victoria, which enacted a permanent ban on CSG in March 2017, after an initial moratorium on the industry was introduced in 2012 (Victorian Office of the Parliamentary Counsel, 2017; Anderson, 2016).



Endeavouring to provide an overview of some of the ways in which a legal geography approach might contribute to ongoing UG discussions in Australia, Turton (2015a, chapter four) focused on the involvement of key legal actors in Australia's CSG debate, including lawyers and judges – while also addressing the 'social licence' implications of using contractual agreements between the CSG industry and landholders to secure access to this resource. It also drew in part on a local case study at Mount Mulligan in Far North Queensland (see also Turton, 2014, chapter three). While not included in the article due to space constraints, the researcher visited the former coal mining town to gain an understanding of the community angst that existed in 2014 over a proposal to extract CSG and coal from the region (Turton, 2015a, chapter four). One manifestation of this could be seen in the use of anti-CSG signage near the mountain in late 2014 (see Figure 1). Although CSG exploration did not proceed in the area, the episode serves as a snapshot in time and an example of the ways in which the histories of a place (Indigenous and non-Indigenous) can be used to contest future land uses. Sense of place is of course an ever-present facet of CSG conflicts, as some legal geographers have noted in aggregate mining and biodiversity contexts (Bartel and Graham, 2016; Van Wagner, 2016a, 2016b).



**Figure 1:** Anti-CSG sentiment on the road to Mount Mulligan (in background). Source: Photo taken by researcher, September 2014.

As Turton (2015a) notes, lawyers, judges and legal academics occupy a significant place in UG discussions around the world, appearing in both professional and personal capacities in press coverage (e.g. Blakkarly, 2016; Gibbs, 2016; Claughton, 2015; Ciampa, 2014; Aston, 2013; Harlum, 2012, 2011), academic studies (e.g. Ladd, 2014, 2013; Turton, 2015c; Trigger *et al.*, 2014) and popular UG literature (Turton, 2016; Nikiforuk, 2015; Manning, 2012; Munro, 2012).

In the realm of fiction, CSG and lawyers have also made a brief appearance in at least one Australian romance novel (Baxter, 2015). This is not unexpected. As a ubiquitous presence in the world, with negative and positive outcomes, arguments over sources of energy and associated societal attitudes are a common feature of written narratives, whether fictional or nonfictional (Grubert and Algee-Hewitt, 2017). Given that Australia's CSG debate has often been adversarial in tone, the appearance of lawyers in this discussion is unsurprising. Sections of the legal profession have been praised by name in government reports into the industry, for providing information to government inquiries on the Crown's ownership of CSG resources (Turton, 2015c, see chapter five). Conversely, lawyers who have acted for anti-CSG interests have also been criticised in the press for 'social activism' (Salusinszky, 2012). Lawyers have featured in criticisms of the negotiation process between landholders and CSG operators (e.g. Anonymous, 2015b), with some landholders suggesting that CSG companies 'only respect aggression, lawyers and opposition' (Phelan, 2015: 310). This thesis makes no attempt to comment on the merits of this claim, but it is clear that politics, community legal education and personal experiences with the legal process all contribute to the types of comments made by lawyers about CSG. Legal industry news websites, such as *Lawyers Weekly*, also contain information that helps to place CSG into the wider economic challenges facing small Australian law firms – who may rely on CSG as part of their diversification strategy to 'survive slow periods' (Garber, 2015). If nothing else, lawyers are of increasing interest to extractive industry scholars more generally, providing unique perspectives on a range of subjects that extend far beyond CSG in Australia (e.g. Perks, 2016; Penman, 2016).

It has been suggested that lawyers have a reputation as 'hired guns', with a 'willingness to argue any case, on any subject, on any side of the argument, and with any rhetorical tools they can find, mixed and matched in any way that advances their positions' (Rose, 2011: 28-29). Although ethical standards are a clear constraint on the behaviour of the profession, 'argumentative flexibility' is nonetheless a key quality for lawyers (Rose, 2011: 29). This mindset may also be conducive to the facilitation of stakeholder communication, with at least one law firm providing a neutral meeting place for industry, non-government, government and civil society representatives to begin discussions on finding a path through CSG land use conflicts in what at times has been a vitriolic debate. The researcher attended this meeting, where it was revealed that the firm agreed to provide a venue for CSG stakeholder discussions as part of its corporate social responsibility activities (Meeting at Australian law firm, 2015).

### **CSG's larger footprint on Australian society**

This contextual statement permits the inclusion of insights from source material that, for reasons of insufficient methodological detail, could not be utilised in a publication – but which give voice to the idea that CSG, and the controversy that it courts, involves far more than just land use disputes, compensation, moratoria, pro- and anti-positions, socioeconomic opportunities/burdens and environmental management quandaries. Discussion of this material

also allows some of the limitations of this thesis to be identified, as well as addressing some of the wider context behind the chapters of this thesis and Australia's CSG debate more generally. For instance, by examining how some Australian lawyers have participated in community forums dealing with CSG, it was revealed that the part lawyers may play in arbitration proceedings in New South Wales has been a source of angst: both for the CSG industry and lawyers acting for landholders (Turton, 2015c, see chapter five). Yet complaints in this context do not appear to be new, with one community forum audience member raising this question in December 2011: 'Just one question referring back to land access, I can't say if it's the truth, but I've heard that farmers are *not* allowed to take their *own* lawyers to arbitration. They have to negotiate on their own' (Three Brothers Network and Johns River Progress Association, 2011: 23, emphasis in original; Anonymous, 2011b). A discussion between forum panellists and the moderator ensued, with some confusion as to whether this was correct. A vague assurance that this was not the case because of the 'Westminster system' was eventually offered to the audience member. Since the researcher had elected to focus the article (Turton, 2015c, chapter five) on the participation of lawyers rather than laypersons (and because the comment was made on the basis of third party information), this forum was not included in the study – but it is notable that arbitration in CSG matters emerged again in forum commentary three years later, with government ultimately seeking a review of the New South Wales mining arbitration framework from Brett Walker SC (2014). Therefore, reversing the study's focus to instead investigate the participation of audience members at recorded CSG forums would likely have revealed different conclusions to the ones reached by the researcher in their pursuit lawyers at these events. With or without the involvement of lawyers as speakers, it is important to note that community CSG forums do not always encompass industry viewpoints, due to a lack of participation – though not necessarily for want of trying. Past explanations given by industry associations for their absence have included a lack of staff and resources (Anonymous, 2011b), see Turton (2015c, chapter five) for more information on this point.

On the subject of industry associations, it should not surprise that lawyers engaged in CSG issues have sometimes affiliated themselves with a range of interest groups concerned with CSG. This wider context is largely absent from Turton (2015c, chapter five), but potentially has some bearing on the ways in which lawyers may choose to communicate information about CSG – with some preferring industry newsletters over recorded community forums (for examples see Turton, 2015a, chapter four and Turton, 2015c, chapter five). Legal firms may also hold professional memberships in stakeholder bodies (e.g. NSW Mining, 2017; Queensland Resources Council, 2017; Australian Petroleum Production and Exploration Association, 2016a) – which might have been a consideration by lawyers contacted by the researcher for an interview, possibly playing a role in their refusal to participate in an interview. While the memberships that some lawyers hold in industry associations have occasionally been criticised by other lawyers in the media (Scott, 2010), these links appear to be a natural consequence of a desire by some lawyers to remain

informed of developments in their area of expertise – a situation common to other areas of legal practice. Membership of CSG-related industry associations may also present advertising opportunities for some lawyers, in the same way that community legal centres such as the Environmental Defenders Office have partnered with universities to promote community engagement and public awareness of their services – which may include expertise in CSG (Turton, 2015c, see chapter five for more details).

Universities of course have the capacity to enter into a variety of research and teaching partnerships – community legal centres being just one example of this (see Hamman *et al.*, 2014). Research alliances between CSG companies and universities/government agencies are another. Perhaps the most prominent Australian example of this occurring in the CSG context is the Sustainable Minerals Institute's Centre for Coal Seam Gas at the University of Queensland in Brisbane, Queensland. While the contentious nature of these arrangements has been acknowledged by commentators in contemporary debates (Hardie *et al.*, 2016), historical links between Australian universities and the then emergent CSG sector appear to be absent from this analysis. This is unfortunate, given that university-industry partnerships have existed around CSG for some time and might therefore be acknowledged by researchers in an effort to highlight precedents that exist for contemporary arrangements (Dovers, 2000a) – thereby possibly alleviating some unease about the implications for research independence and the future of universities in Australia (Hardie *et al.*, 2016). One historical example can be seen in the activities of economic geologists at James Cook University's Coal Gas Research Institute in the early 1990s. The Institute was established at the university in Townsville and was subcontracted to perform laboratory work for a joint venture project in the Bowen Basin between MIM Holdings and MGC Resources Australia Ltd (Oldroyd, 1993). The university's Department of Geology also provided their expertise, studying areas most suited to gas development (Osborne, 1989). Some of their findings were revealed at a research symposium held by the university into coalbed methane development in November 1992 – the proceedings of which were later published in five volumes (e.g. Barker and Heron, 1992; Hoare, 1992).

Government agencies too have sought to establish collaborative research initiatives with the CSG industry. Established in July 2011 (Gas Industry Social and Environmental Research Alliance, 2017), the Commonwealth Scientific and Industrial Research Organisation's (CSIRO) partnerships with CSG companies and other government agencies through the Gas Industry Social and Environmental Research Alliance (GISERA) is the latest manifestation of a long-standing interest in CSG by CSIRO. While the intent of this thesis is not to offer a detailed historical background to the close relationship between CSG companies and CSIRO, it is worth noting that CSIRO took a keen interest in the industry's development from at least the early 1990s onward. As described by two employees of the organisation:

CSIRO's research programme is aimed at fostering the infant coal bed methane industry in Australia by operating in four complementary ways: by

undertaking research into generic issues of concern to the emerging coal bed methane industry in general, by being involved regional resource assessments, by providing specialist services on a fee for service basis to commercial coal bed methane interests [and] by becoming an integral part of technology demonstration projects with commercial partners...A very close relationship with industry has been established at all levels of activity (Enever and Jeffrey, 1991: 61).

Beyond geologists at CSIRO and James Cook University, the New South Wales Electricity Commission also expressed an interest in CSG in this same period for the purposes of electricity generation (Bocking and Weber, 1991). This was in line with broader government investigations into the prospects of a methane drainage industry in the Sydney Basin (Turton, submitted manuscript, see chapter seven). It is important to stress that government opinions on CSG may well differ over time and jurisdiction. In addition to Australian local governments having a range of fluctuating views about this resource, from active resistance to open support (e.g. ABC News, 2015b; ABC News, 2015c; Anonymous, 2014d; ABC News, 2011), individual state government agencies may emphasise different aspects of the challenges and opportunities of CSG – notwithstanding the political imperative for consistency in government messages.

In 2017, the New South Wales Department of Planning and Environment declared in a regional plan that: ‘The NSW Government has no intention to revive coal seam gas on the North Coast’ (New South Wales Department of Planning and Environment, 2017: 41). Yet, in early March 2016, the north coast of the state was promoted by the New South Wales Department of Industry as having ‘very good potential’ for CSG at the 84<sup>th</sup> Prospectors and Developers Association of Canada Conference, held 6-9 March 2016 in Toronto. When these departmental brochures were revealed to the media in May 2016, the Department conceded that the information was ‘not in line with the Government’s resources agenda’ and regretted that the information was shared at the event (McNally, 2016). It is unclear why the promotional materials were only identified in the media in May 2016, given the event concluded in early March (Pers Comm. with conference attendee, May 2016). This episode highlights the fact that government messages can differ, a circumstance which is neither unique to New South Wales nor limited to CSG (Willacy, 2017). Notably, government buybacks of CSG exploration licences had taken place in the New South Wales North Coast region over several months in 2015 – after anti-CSG protests, litigation and political wrangling (Connor, 2016; ABC News, 2015d, 2015k). Regulatory context is certainly important to consider when contrasting the approaches of New South Wales and Queensland to CSG. As Cronshaw and Grafton note in their examination of these two states:

In Queensland...tacit acceptance of gas operations...has led to an experience with and learning about the benefits and costs [of CSG, driving more stringent state regulation, proactive engagement and adaptive management], [which in turn] has helped to legitimise gas extraction [in that state]...By contrast, N[ew] S[outh] W[ales] were more responsive to intense local pressures to either slow down or stop...[CSG development] (2016: 260-261).

The abovementioned research partnerships and the involvement of different government portfolios are therefore illustrations of some of the ways in which CSG has become embedded in

Australian society over time and involved the expertise of multiple professions, from geologists, to engineers, planners, lawyers and beyond. Given the visibility of lawyers in CSG discussions mentioned above, the appearance of judges in CSG commentary is not unexpected. This has usually occurred through their judicial writings, although at least one former Federal Court judge has also made written submissions on the subject of arbitration arrangements for landholders in New South Wales in relation to CSG and spoken publicly about their experiences with the legal process at one community forum (Turton, 2015c, see chapter five). Turton (2017, see chapter six) attempts to explore the views of judges through an environmental justice lens that is informed by legal geography. While generally reluctant to comment on the value or otherwise of CSG as a resource, judges nonetheless appear to be fully cognisant of the political sensitivity that surrounds CSG – and are often at pains to highlight their limited capacity to resolve this wider community debate. As other legal commentators have pointed out, coexistence challenges abound in CSG projects, with coordination needed to deliver legal, technical, social and environmental solutions – in an ongoing effort to achieve and maintain a social licence to operate (Thomas *et al.*, 2015). An example of the judiciary's political awareness can be found in their acknowledgement of counsel arguments, as seen in the remarks of Magistrate Heilpern in the New South Wales case of *Police v Rankin; Police v Roberts* (2013): [82], [85]:

[The defence] submit that a question arises as to whether the prosecutions [of two anti-CSG protestors] are being pursued for a political aim, given the high profile issue of CSG in the community...The defence is correct that the CSG issue is political, to say the least.

Judges involved in CSG decisions are generally also quick to acknowledge their limitations in finding solutions for community members who oppose CSG. This has been acknowledged in Queensland by Magistrate Matthew McLaughlin at Chinchilla: 'My own personal opinion...[of CSG] is irrelevant, of course. I'm simply here to enforce the rules that the government makes' (Quoted in Manning, 2012: 10). While not all court judgments provide insights into the procedural and distributive justice aspects of CSG, judicial determinations are nonetheless useful for discerning trends in CSG litigation and highlight the shifting nature of CSG disputes over time – from cases concerned with anti-CSG protests (e.g. *Hutton v The Queensland Police Service*, 2012), to water issues (*Westrex Services Pty Ltd & Anor Maranoa Regional Council*, 2014), freedom of information requests (e.g. *Watts v Department of Planning and Environment*, 2016) and compensation for landholders (*QGC Pty Limited & Ors v Eugenehans Peter Vogt & Anor*, 2017). Further discussion on the contribution of judges to justice outcomes in relation to CSG can be found in Turton (2017, chapter six).

To some extent, CSG litigation in Australia is a microcosm of the nation's wider debates over this resource and there is certainly scope for future researchers to make use of court findings to substantiate claims made in other sources, including remarks made by key political and public servant figures about the historical development of Queensland's coal seam gas sector – part of a larger oral history project called Queensland Speaks (Fennelly, 2014; Hogan, 2013; McGrady,

2011; Rolfe, 2011; Springborg, 2011; Beattie, 2010). For example, a former Queensland Premier, Peter Beattie, has described the advent of CSG production in terms of a state government policy that mandated that from 2005, electricity retailers should source at least 13% of their power from natural gas rather than conventional fuels such as coal (Beattie, 2010). This scheme was discontinued at the end of 2013 (Cronshaw and Grafton, 2016). A former Queensland mining minister has viewed CSG from another angle, as a hazard to underground coal miners – noting union advocacy for the extraction of gas to improve mine safety (McGrady, 2011). These perspectives aid in illustrating what might be regarded as CSG's trifecta, being a safety risk for underground coal miners, a source of wealth for gas producers and arguably a transitional fuel in a carbon-constrained future. Beyond the value of these oral histories as a means of contextualising Australia's present-day CSG conversation (Dovers, 2000a), these historical insights may also be used to approach emerging land use challenges in a more constructive manner. A clear example in the UG context can be seen in Australia's emerging shale gas sector. As 'the new kid on the block' (Walton, 2014: 16), it is worth asking what this infant industry might learn from the Australian CSG experience in relation to community engagement, compensation arrangements and appropriate regulation. Whether or not lessons can be drawn from CSG so as to inform embryonic shale developments in Queensland remains to be seen.

One of the ways in which a legal geography lens could enliven existing social science literature about anti-CSG protests from the social movement Lock the Gate (e.g. Colvin *et al.*, 2015; Hendriks *et al.*, 2016; Ricketts, 2012) could be an examination of the physical spaces of protest and the legislative environment that governs them. Protest and dissent in various guises has certainly caught the attention of legal geographers (Akinwumi, 2012; Schwedler, 2012; Mitchell and Staeheli, 2005) and legal geographers recognise that a protest camp can of course be an example of a 'splice' – a splice being a moment where 'legally informed decisions and actions *take place*' (encompassing both a legal performance and a spatially located and embodied event) – weaving together spatial and legal meanings (Bennett and Layard, 2016: 410, emphasis in original). While protest camps have appeared in CSG scholarship (Turton, 2015a), the manner in which legal frameworks have been deployed by various Australian parliaments to reduce the physical spaces in which anti-CSG and anti-coal mining protests can occur deserves further consideration, beyond that of legalistic interpretations and media coverage of what some commentators have described as 'anti-protest' laws (Levin, 2016; Raper, 2016; Ricketts, 2015).

Another possibility for future research could lie in analysing planners as legal geographers. Planners and the work they perform have featured in the legal geography literature occasionally, but could be examined more thoroughly in future research (e.g. Prior *et al.*, 2013; Carr, 2010; Harrison and Bedford, 2003). Outside of legal geography scholarship, planners are underexplored in the Australian CSG literature, despite making comment on the industry in a number of forums and being identified in recent research in New South Wales examining changing attitudes to land use associated with coal and CSG developments in the Narrabri community (Askland *et al.*, 2016;

Robinson, 2014a, 2014b). This is also true of the larger international UG literature, much of it focussing on recommendations for planners to follow, so as to better respond to the complex socio-economic impacts arising from UG development from exploration to export – rather than the views of planners themselves (e.g. Orland and Murtha, 2015; Boudet and Ortolano, 2010). Planners are key figures in land use disputes and their perspectives can be found across a range of contentious arenas, from wind farms, to aggregate mining, to the health impacts of climate change in urban areas and beyond (e.g. Van Wagner, 2016a, 2016b; Burton *et al.*, 2015; Leibenath and Otto, 2013; Watson *et al.*, 2012).

Beyond lawyers and judges, planners, auditors and valuers have all brought their professional expertise to CSG issues in various ways – some of which have been acknowledged in press coverage and government reports (e.g. Land and Property Information New South Wales, 2014; Queensland Audit Office, 2013-2014; Anonymous, 2013a; Riley, 2013). At the time of writing, much of the existing UG social science literature focuses on community-wide impacts, risk perceptions and attitudes (e.g. Bec *et al.* 2016; Whitmarsh *et al.* 2015; Ladd, 2013). Therefore there is certainly scope for the contributions of professions linked to the CSG sector to be acknowledged and incorporated into this wider literature – with some research already undertaken, both within the domain of UG (Schafft *et al.*, 2014; Turton, submitted manuscript – see chapter seven), and in the related arena of climate change and carbon markets (Lovell and Ghaleigh, 2013). This approach may permit greater discussion of the nuances of UG and its various impacts (both positive and negative) – complementing community-wide research efforts.

As noted above in the methods section, the researcher elected to focus on lawyers, judges and planners in this thesis, but it is apparent that several other types of professionals could readily be scrutinised. For example, those engaged in the provision of mental health services to those affected by CSG development (Morgan *et al.*, 2016). Commentary on CSG issues from stakeholder associations may also be one means of targeting multiple professions contained within the one organisation – particularly given that some key national lobby groups have released broad statements on the subject (e.g. Australian Medical Association, 2013). For example, the Queensland Environmental Law Association (QELA) represents a wide range of interests implicated in resources development – including lawyers, judges, engineers, environmental scientists, property valuers, academics, developers and planners (Queensland Environmental Law Association, 2017). In the Association's view this membership diversity had a hand in determining the nature of their response to a government inquiry into regional planning interests legislation:

QELA is a non-profit multi-disciplinary organisation. Its members include...[those] who represent and advise participants in the development industry. QELA's members have already made some submissions to the committee – and they include representatives of the resource sector, environmental interest groups and local and state governments – and it is in that context that QELA does not propose to make any submissions about the policy objectives, because we represent a wide range of interest groups, but



our submissions focus on the procedural aspects of the bill that will impact on our members. We are really keen to see the bill get the procedural issues right, because that is in everybody's interests (Queensland Parliament State Development, Infrastructure and Industry Committee, 2014: 19).

The Queensland Law Society adopted a similarly neutral stance on the issue during public hearings into the then Queensland Mineral and Energy Resources (Common Provisions) Bill 2014, acknowledging that the Society's members 'represent landowners, industry, local government and community groups' (Queensland Parliament Agriculture, Resources and Environment Committee, 2014: 18). This desire to avoid conflict between members in multidisciplinary organisations may well have informed the attitude of the Queensland Grain Growers Association when entering into negotiations with the Queensland Chamber of Mines to improve industry awareness of soil erosion caused by coal exploration on grain growing properties – ultimately leading to the crafting of their Explorer-Landholder Procedures document (see above, Turton, 2014; chapter three).

The final substantive component of this thesis deals with planners. Although not discussed in Turton (submitted manuscript, see chapter seven) due to a focus on the self-perceptions of planners in Australia's CSG debate, it is arguable that members of this profession, much like lawyers and judges, are legal geographers and 'spatial detectives' in their own way – operating within legal frameworks while attempting to find solutions to problems that entail a spatial element (Bennett and Layard, 2016). Turton (submitted manuscript, chapter seven) draws on research from the Republic of Ireland into the roles and self-perceptions of planners. Expanding on the roles used by Fox-Rogers and Murphy (2016), this paper uses their framework as a typology to conduct an empirical analysis of the planning profession's engagement in Australia's CSG debate – focussing on New South Wales and Queensland. With an emphasis on local government planners, this paper extends themes considered earlier in the thesis candidature, particularly the value of historical context to contemporary disputes (in this case the part played by planners historically in CSG issues) and the involvement of planners as both audience members and presenters at CSG community forums – in common with lawyers, as discussed above (see Turton, 2015c – chapter five). Sometimes these events have taken the form of an 'information expo', as occurred in the Shire of Irwin in Western Australia in 2015 – designed to ensure that the public had access to relevant information about CSG (ABC News, 2015e).

Viewpoints on CSG were obtained through a combination of existing research, documentary sources and interviews with 22 local/state government and consultant planners for industry. Numerous challenges were encountered by the researcher when attempting to secure the participation of potential interviewees, but these difficulties do not appear to have been beyond the norm experienced by other researchers investigating UG internationally (Jenkins *et al.*, 2015). Many of those interviewed took the view that planners were often blamed for land use outcomes, whether or not planners themselves held the ultimate decision-making power on changes to a

landscape. Planners interviewed by the researcher openly acknowledged challenges facing the CSG industry, water disposal being a key concern:

The question is...how you manage on the ground a bit better and obviously technology helps with that...I think research should play a bit more of a role as well...Because most of the companies I've dealt with view saline water as probably their biggest issue (Interview with consultant planner #2, November 2016).

Efforts have been made by CSG companies to treat and reduce wastewater arising from their operations, offering industrial and agricultural water users an alternative water supply during periods of drought – a trend observable in other areas of Australia's mining industry (Hodgkinson *et al.*, 2014). Although water is a critical issue in CSG discussions and bound up with both risks and rewards for landholders (e.g. Tan *et al.*, 2015), Turton (submitted manuscript, chapter seven) focused primarily on how planners view their roles in local/state governments in relation to CSG – with some attention being given to community CSG forums and the historical involvement of the profession in methane drainage in New South Wales in the early 1990s. Fox-Rogers and Murphy (2016) situate the self-perceptions of planners into a series of roles: the technical expert, social gatekeeper, facilitator of development, community advocate and mediator. These categories were applied to interviews and documentary sources involving planners, with the researcher concluding that planners adopt multiple roles when addressing stakeholder demands arising from CSG, while also voicing public and private opinions as what they perceive are the future challenges and opportunities facing CSG in Australia. Local context also helped to inform the comments of planner interviewees. One individual, located in Moranbah in the coal-producing Bowen Basin region in Queensland, stressed that support for CSG was generally high in the community due to the safety risks that methane presents to underground coal mines. Fieldwork near the town by the researcher confirmed this, with methane drainage infrastructure to flare off methane located at coal mines as a safety precaution (see Figure 2). Planners have value as a key group of professionals linked to CSG, potentially assisting in casting light upon a controversial land use – as planners inevitably deal with other forms of land use conflict.



**Figure 2:** Methane drainage continues to be a critical part of underground coal mines, near Moranbah, Queensland. Source: Photo taken by researcher, November 2016.

Having canvassed the general structure of the thesis in the methods section above and delved into some of the wider context of Australia's CSG debate and the substantive chapters that follow, the remainder of this contextual statement is given over to matters that are only dealt with in a peripheral fashion elsewhere in this thesis. One aspect of Australia's CSG debate that is not examined systematically in this thesis revolves around the climate change implications of this industry. Water security is a central issue in CSG deliberations in Australia and whatever the relative merits of CSG as a transition fuel (Barnett, 2010), or 'greenwash' as others have described it (Stephenson *et al.*, 2012) in a carbon-constrained future, it seems unlikely to disappear soon as a point of contention in ongoing challenges surrounding the management of the Great Artesian Basin – one of the largest subterranean aquifer systems in the world (de Rijke *et al.*, 2016). Although there may be potential for litigation in Australia on climate change grounds in the future (if past coal mining challenges are any indication), this is only briefly acknowledged in this thesis (Turton, 2015c, chapter five) – due to the absence of any case law on the subject to date and the

difficulties presented in accurately recording methane emissions for the purposes of environmental impact assessment (Vickas *et al.*, 2015). However, climate change undoubtedly has a place in the Australian legal geography literature and there would certainly be scope for its inclusion in future CSG research if the resource is taken up by litigants in the future – as showcased in a recent study of coastal planning and climate change adaptation (O'Donnell, 2016).

The contested nature of the CSG sector has also led some commentators to put forward suggestions that might be described as quite conventional mechanisms for responding to community complaints about the industry. Calls for the creation of a specialist 'resources' or 'mining' ombudsman have been made, as have demands for a royal commission into the human impacts of mining (ABC News, 2015i). Both concepts have been utilised before: either in different contexts (e.g. the Royal Commission into Institutional Responses to Child Sexual Abuse, currently ongoing at the time of writing), or already exist as an institution in a generalist complaint-handling capacity – mediating between the community and public servants at state, national and local government levels. Indeed, both the state and federal governments in Australia have regulatory responsibilities for mitigating the potential impacts of CSG, but commentators have yet to engage with how such jurisdictional questions might be split between them. Could joint federal and state ombudsman investigations be held into CSG matters where appropriate? Scope certainly exists for such cooperation in a legislative sense and strong collaboration between Australian ombudsmen has been shown in the past (Turton, 2015b).

When one considers the socio-political context behind the introduction of the 'classical ombudsman' model into Australia in the 1970s and industry-specific iterations since the 1980s, the establishment of a dedicated CSG ombudsman at either State or Commonwealth level appears remote at the present time without significant political support (Turton, 2012). While there are examples of ombudsman type arrangements for the protection of the environment in Australia (in Victoria and the Australian Capital Territory, see Shindo, 2013), factors that have historically spurred on the creation of an ombudsman (calls for human rights protections, the creation of a welfare state with a consequential expansion in the powers of public administrators and so on) would appear to be lacking at the time of writing (Turton, 2015b; Turton, 2012). It may therefore be more appropriate for existing ombudsmen to receive additional funding to respond to community complaints. Notably, the New South Wales Ombudsman has already participated in government inquiries into CSG (e.g. New South Wales Parliament Legislative Council, 2012) and sought to investigate complaints from the community about perceptions of bias in government decision making around coal mines and CSG approvals (McCarthy, 2015).

### **Conclusion**

This thesis has sought to address the Australian CSG controversy through a number of lenses. First, it has attempted to link CSG land access issues and Queensland's Land Access Code 2010 and contemporary attempts at coexistence with earlier efforts to ease tensions between grain growers and coal miners in Queensland in the early 1980s. Viewing this as an exercise in informal,

voluntary legal geography between stakeholders, legal geography was then pursued in the specific context of UG in Australia. Highlighting gaps in the literature, land access challenges and the need to include legal practitioner voices in future research, this paper then formed the basis for an extended discussion of recorded CSG community forums and the participation of lawyers at these events. Conscious of the existing case law on CSG in Australia and growing legal commentary, an effort was then made to examine the views of judges in relation to this resource. Exploring CSG-related court judgments through the prism of legal geography and with an eye to distributive and procedural justice, broader issues about environmental and social justice processes and outcomes were uncovered.

Continuing the profession-focused theme of this research, the perspectives of planners were then considered through interviews, existing UG literature and documentary sources. Drawing upon research into the roles and self-perceptions of planners in the Republic of Ireland, it was found that planners involved in CSG matters in Australia held a range of positive and negative views about the sector. Constrained by legislation, the limits of jurisdiction and their political environment, planners nonetheless adopted multiple roles in CSG disputes to meet changing stakeholder demands – from community advocate to social gatekeeper and beyond. Ultimately, the use of environmental history, justice, legal geography and profession-specific perspectives in this thesis has demonstrated a number of ways in which societal debates over CSG can be understood in Australia and perhaps internationally.

## Chapter 3: Codifying coexistence: Land access frameworks for Queensland mining and agriculture in 1982 and 2010

This chapter was published as David J. Turton, 2014, 'Codifying coexistence: Land access frameworks for Queensland mining and agriculture in 1982 and 2010, *Journal of Australasian Mining History*, vol. 12: 172-192. See Appendix 1 for published version.

Media and academic commentary on the growth of coal mining and coal seam gas development in Australia frequently utilises the theme of conflict between the needs of this industry and pre-existing land uses, namely agriculture, depicting these two industries in a struggle over livelihoods and landscape.<sup>1</sup> Historians and human geographers have noted the escalating friction between agriculture and coal mining in Australia from the 1980s onward. Acknowledging that conflict arose because of the increased proximity of the two sectors, frameworks designed to promote coexistence between agriculture and coal mining in this era are nonetheless missing from the literature.<sup>2</sup> Yet during the 1980s, the need for compromise between them was remarked upon.<sup>3</sup> Indeed, the challenge of promoting coexistence between mining and agricultural interests remains a topic of great interest for corporate social responsibility researchers in the present.<sup>4</sup> Therefore this case study of the preparation of a voluntary 'Explorer-Landholder Procedures: A Common-sense Guide to Good Relations Between Miners and Farmers' (the 'Guide'), in 1982, is offered as an example of an attempt to promote accommodation between agriculture and mining in Queensland, in order to highlight what might be possible in the present era through the current Land Access Code (the 'Code') – a document partly legislatively mandated and introduced in November 2010.<sup>5</sup> In seeking to draw on the experience of the Guide and evaluate the Code, a 'typology of relevance' for environmental

<sup>1</sup> For example, Michael Weir and Tina Hunter, 'Property rights and coal seam gas extraction: the modern property law conundrum', *Property Law Review*, vol. 2, no. 2, 2012, pp. 71-83; Meg Sherval and Kristian Hardiman, 'Competing perceptions of the rural idyll: responses to threats from coal seam gas development in Gloucester, NSW, Australia', *Australian Geographer*, vol. 45, no. 2, 2014, pp. 185-203.

<sup>2</sup> Geoffrey Evans, 'A just transition to sustainability in a climate change hot spot: the Hunter Valley, Australia', PhD thesis, University of Newcastle, 2009, pp. 65-66, <http://nova.newcastle.edu.au/vital/access/manager/Repository/uon:6253>, accessed 12 August 2014; Sonya Duus, 'Coal contestations: learning from a long, broad view', *Rural Society*, vol. 22, no. 2, 2013, p. 101, 102; Ruth Kerr, *Freedom of Contract: A History of the United Graziers' Association of Queensland*, United Graziers' Association of Queensland, Brisbane, 1990, pp. 181-182.

<sup>3</sup> G.I. Alexander, 'Agriculture gears up for 21<sup>st</sup> century', *Queensland Agricultural Journal*, vol. 107, no. 6, 1981, p. 291; T.P. Farrell, 'Mining and rangelands: conflicting or compatible', in P.J. Joss, P.W. Lynch and O.B. Williams (eds.), *Rangelands: A Resource Under Siege – Proceedings of the 2<sup>nd</sup> International Rangeland Congress*, Australian Academy of Science, Canberra, 1986, pp. 147-151.

<sup>4</sup> For example, Nina Collins, Jo-Anne Everingham, Thomas Baumgartl, Sue Vink, Daniel Rodriguez, Jim Cavaye, David Mulligan and Will Rifkin, *Energy Resources From The Food Bowl: An Uneasy Co-Existence. Identifying and Managing Cumulative Impacts of Mining and Agriculture*, Research Paper, Sustainable Minerals Institute, University of Queensland, Brisbane, September 2013, pp. 64-71, <https://www.csr.m.uq.edu.au/publications/energy-resources-from-the-food-bowl-an-uneasy-co-existence-identifying-and-managing-cumulative-impacts-of-mining-and-agriculture>, accessed 12 August 2014.

<sup>5</sup> Queensland Government, *Land Access Code*, Department of Employment, Economic Development and Innovation, Brisbane, 2010, pp. 1-10, [http://mines.industry.qld.gov.au/assets/land-tenure-pdf/land\\_access\\_code\\_nov2010.pdf](http://mines.industry.qld.gov.au/assets/land-tenure-pdf/land_access_code_nov2010.pdf), accessed 12 August 2014; *Petroleum and Gas (Production and Safety) Act 2004* (Qld), s 24A.

history, as devised by Stephen Dovers, is referred to as a convenient structural format and analytical device.<sup>6</sup>

After discussing this typology, the literature concerning voluntary codes of conduct in the mining industry and the wider political context of the Guide's preparation will be detailed, followed by a brief overview of the legal background that informs land access arrangements in Queensland – before examining the case study. It is argued that the Guide's formulation occurred without government involvement, relying instead on cooperation between industry representative bodies – the Queensland Grain Growers Association and the Queensland Chamber of Mines. However, the desire for an accommodative framework between these parties emerged in the context of broader government efforts to reform Queensland's mining legislation, culminating in the passage of the *Mining Act and Other Acts Amendment Act 1982* (Qld). The Guide is linked with a general growth in voluntary agreements between industry and government from the 1980s to the present. It is further suggested that the Guide may be of assistance in any future changes to the largely statutory-based Code, particularly as an example for improved relationships between stakeholders in a voluntary capacity.

### **A Typology of Relevance**

Dovers' typology indicates the potential for environmental history to constructively participate in contemporary sustainability debates and policy. Calling for a 'pragmatic' environmental history, Dovers argues that in addition to their normal scope of operations, a more explicit connection to the sustainability challenges of today should be made by historians.<sup>7</sup> Envisioning three levels of relevance where environmental history might be expected to offer insight, Dovers treats the first of these as offering a general historical perspective to seemingly 'new' sustainability challenges – essentially informing and contextualising contemporary problems.<sup>8</sup> In terms of this case study, this aspect of relevance can be seen in the extent to which provisions of the Guide are replicated in the modern-day Code, with both documents drafted to meet the challenge of ensuring the successful management of two crucial industries. Using historical analogies for contemporary events is of course as attractive to media commentators as it is to historians, whether to support a policy direction or criticise it – and may not necessarily be faulty in its application.<sup>9</sup> Coal seam gas has not escaped this, with Owen Powell noting the degree of parallel between modern coal seam gas access concerns and historical struggles over water rights in the Great Artesian Basin from the sinking of bores to further the ambitions of Australia's pastoral industry during the late 19<sup>th</sup> and early 20<sup>th</sup> centuries.<sup>10</sup>

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<sup>6</sup> Stephen Dovers, 'On the contribution of environmental history to current debate and policy', *Environment and History*, vol. 6, no. 2, 2000, pp. 131-150.

<sup>7</sup> Dovers, 'On the contribution', p. 131.

<sup>8</sup> *Ibid.*, pp. 138-139.

<sup>9</sup> David McLean and Ian Gray, 'History for policy: what is the value of history for the in-principle assessment of government intervention in rural Australia?', *Rural Society*, vol. 21, no. 3, 2012, pp. 193-194.

<sup>10</sup> O.C. Powell, 'Song of the Artesian Water: Aridity, drought and disputation along Queensland's pastoral frontier in Australia', *The Rangeland Journal*, vol. 34, no. 3, 2012, p. 315.

A second layer of relevance focuses on the establishment of human and non/human baselines, as ‘useable understandings of change in dynamic systems, be they natural or human, will not emerge without appreciation of previous states’.<sup>11</sup> The obvious application to this analysis lies in the types of factors that drove legislative change, how amendments to the *Mining Act* were found wanting amongst farmers and miners, such that they felt compelled to negotiate and then jointly release the Guide to achieve the goals they desired for coexistence in the landscape.<sup>12</sup> While Queensland’s legislative process was insufficient to respond to the requirements of all stakeholders in the 1980s – forcing a voluntary approach to the task – the law has become an essential instrument in protecting the interests of all parties in the present. Yet the shift to a legislatively endorsed Land Access Code is not complete and still demands an exercise of voluntary goodwill in relation to part two of the Code (which deals with matters of communication and the negotiation of land access agreements), raising concerns amongst some stakeholders of unmet expectations. This was despite a recent review of the Code, which concluded that ‘many landholders believe positive outcomes can be attributed to the Land Access Code’.<sup>13</sup>

Finally, Dovers posits that environmental history may be capable of presenting relevance through ‘real policy, institutional, or management lessons to be learned from past experiences’.<sup>14</sup> Acknowledging that it is somewhat vulnerable to challenge,<sup>15</sup> this layer of relevance urges historians to investigate topical policy problems and institutional challenges by engaging in a ‘search for precedents, warnings or models of [previous responses to environmental change]’.<sup>16</sup> Nor is Dovers alone in calling for historians to assume a place in the development of policy.<sup>17</sup> Before discussing the literature that informs this case study, it is stressed that the use of Dovers’ typology should be viewed as ‘a step along the way’ to encouraging an increased range of purposes for environmental history – rather than a final and determinative statement on its application.

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<sup>11</sup> Dovers, ‘On the contribution’. p. 139.

<sup>12</sup> Stephen Dovers, ‘Still settling Australia: environment, history, and policy’, in Stephen Dovers (ed.), *Environmental History and Policy: Still Settling Australia*, Oxford University Press, Oxford, 2000, pp. 5-6.

<sup>13</sup> Queensland Land Access Review Panel, *Land Access Framework – 12 month Review: Report of the Land Access Review Panel*, Brisbane, February 2012, p. 41, [http://mines.industry.qld.gov.au/assets/native-title-pdf/Land\\_Access\\_Review\\_Panel\\_report.pdf](http://mines.industry.qld.gov.au/assets/native-title-pdf/Land_Access_Review_Panel_report.pdf), accessed 12 August 2014.

<sup>14</sup> Dovers, ‘Still settling’, p. 6.

<sup>15</sup> McLean and Gray, ‘History for policy’, pp. 191-93.

<sup>16</sup> Dovers, ‘On the contribution’. p. 140.

<sup>17</sup> McLean and Gray, ‘History for policy’, pp. 192-193; E.J. Balleisen and E.K. Brake, ‘Historical perspective and better regulatory governance: an agenda for institutional reform’, *Regulation and Governance*, vol. 8, no. 2, 2014, pp. 222-245.



## Literature overview

While recognising that mining history is ‘one of the neglected aspects of Australian environmental history’, with an emphasis towards the heritage of individual companies and nineteenth century gold rushes rather than more recent events,<sup>18</sup> that tendency is shifting in light of current controversies over mineral extraction in Australia.<sup>19</sup> Others, such as Ross Fitzgerald and Drew Hutton,<sup>20</sup> have assessed the environmental impact of Queensland’s mining heritage through what John McNeill has described as a political approach to environmental history, with investigations focussed on ‘law and state policy as it relates to the natural world’.<sup>21</sup> In terms of this case study, there has been a clear desire amongst legal commentators to acknowledge the history of Queensland’s *Mining Act* when relevant. The emergence of environmental responsibility as a policy objective in state legislation has been observed in the different purposes of the *Mining Act 1968* and its successor, the *Mineral Resources Act 1989*.<sup>22</sup> Specific attention has also been drawn to the *Mining Act and Other Acts Amendment Act 1982* (Qld) in the context of the development of compensation provisions for landholders.<sup>23</sup>

At the time of its enactment, media and academic commentary on the Act was somewhat limited.<sup>24</sup> For interested parties in mining, conservationist and agricultural circles, however, there was much to discuss when the Act came into operation on 1 August 1982.<sup>25</sup> This literature offers an insight into the priorities of the legislature during this period, but the Guide itself also received some attention as part of a wider effort to minimise the exploratory impacts of mining operations, inspiring the Northern Territory Chamber of Mines to prepare its own Code of Conduct for Mineral Explorers in consultation with rural organisations in 1983.<sup>26</sup>

<sup>18</sup> Libby Robin, ‘Australia in global environmental history’, in J.R. McNeill and E.S. Mauldin (eds.), *A Companion to Global Environmental History*, Wiley-Blackwell, Oxford, 2012, pp. 185-186.

<sup>19</sup> For recent examples see Duus, ‘Coal contestations’, pp. 96-110 and Drew Cottle, ‘Land, life and labour in the sacrifice zone: the socio-economic dynamics of open-cut coal mining in the Upper Hunter Valley, New South Wales’, *Rural Society*, vol. 22, no. 3, 2013, pp. 208-216.

<sup>20</sup> Ross Fitzgerald, *From 1915 to the early 1980s: a history of Queensland*, University of Queensland Press, Brisbane, 1984, pp. 304-387, <http://espace.library.uq.edu.au/view/UQ:203571>, accessed 12 August 2014; Drew Hutton, *Mining: the Queensland way*, At a Glance Pty Ltd, Brisbane, 2013.

<sup>21</sup> J.R. McNeill, ‘Observations on the nature and culture of environmental history’, *History and Theory*, vol. 42, no. 4, 2003, p. 6.

<sup>22</sup> Douglas Fisher, ‘The nature of the environmental legal system’, in W.D. Duncan (ed.), *Planning and Environment Law in Queensland*, Federation Press, Sydney, 1993, pp. 89, 94-95.

<sup>23</sup> Kristy Richardson and John Compton, ‘An examination of the heads of compensation available under the Mineral Resources Act 1989’, *Queensland Lawyer*, vol. 30, no. 2, 2010, pp. 71-73.

<sup>24</sup> Matt Robbins, ‘Nationals bid to tighten mining “stranglehold”’, *Courier Mail*, 2 October 1981, p. 3; Margaret Cribb, ‘Australian Political Chronicle: Queensland’, *Australian Journal of Politics and History*, vol. 28, no. 1, 1982, p. 95.

<sup>25</sup> *Queensland Government Gazette*, no. 120, vol. 270, 24 July 1982, p. 2422; G.T. Houen, ‘Mining, Agricultural or Grazing Land’, paper presented at ‘Mining as a Land Use’ Queensland Chamber of Mines Seminar, 26 August 1982, Brisbane, pp. 1-9; R.A. North, ‘The Mining Act and Other Acts Amendment Bill 1981 (Qld.) – Part I’, *Australian Mining and Petroleum Law Bulletin*, vol. 1, no. 2, 1982, pp. 29-33, <http://www.austlii.edu.au/au/journals/AUMPLawB/1982/9.html>, accessed 12 August 2014; K.D. MacDonald, ‘The Mining Act And Other Acts Amendment Bill 1981 (Qld.) – Part II’, *Australian Mining and Petroleum Law Bulletin*, vol. 1, no. 2, 1982, pp. 34-37, <http://www.austlii.edu.au/au/journals/AUMPLawB/1982/10.html>, accessed 12 August 2014; Grahame Wells, *Queensland Conservation Council Comments on the Queensland Mining Act and Other Acts Amendment Bill 1981-82*, Queensland Conservation Council, Brisbane, 1982.

<sup>26</sup> National Farmers’ Federation to Member Bodies, 30 June 1983, Mining Rights, Queensland State Archives (hereafter QSA), item 1239143.

Codes and guides of various forms have been utilised to manage interactions with the mining industry since at least the 1980s. At the national level the Australian Conservation Foundation worked alongside the Mining Council of Australia in 1997 to produce an industry code of practice, following a *Mining and Ecologically Sustainable Development* report in 1994.<sup>27</sup> Other examples of voluntary land access codes from this period can be found in Victoria, New South Wales and Western Australia.<sup>28</sup> More broadly, voluntary guidelines accorded well with the Australian coal industry's stated preference for self-regulation in the 1980s and the commissioning of studies to identify strategies to minimise the impact of their exploration activities on pastoral lands.<sup>29</sup> The fact that the Guide was implemented without the intervention of the Queensland Government is unusual for self-regulation schemes in general, given that governments often assume a facilitator role in bringing the requisite parties together to craft the desired standards.<sup>30</sup> The mining industry's trend of striking agreements with primary producers which do not have statutory force has continued to the present, with the recent signing of a Principles of Land Access agreement in New South Wales, between AGL, Santos, Cotton Australia and the NSW Irrigators Council. The agreement is designed to grant the landholder the right to refuse drilling for coal seam gas on their land. However, the agreement does not extend to the right to refuse the development of infrastructure associated with the industry on a farmer's property – namely power lines, roads and pipelines.<sup>31</sup>

Due to the types of lobby groups represented, this case study draws on historical conflicts between agricultural and mining interests that are framed in the context of competing expressions of capitalism – rather than a conservationist versus development-minded ethos – as evidenced, for example, in resource disputes between non-indigenous farmers and gold miners in colonial Zimbabwe (Southern Rhodesia).<sup>32</sup> After all, passage of a statute with the apparent aim of environmental protection does not necessarily mean that it originated with an explicitly 'green' motivation. The initial driving force behind Queensland's *Litter Act 1971*, for example, was sparked not by a Keep Australia Beautiful campaign (as occurred in Western Australia),<sup>33</sup> but

<sup>27</sup> Drew Hutton and Libby Connors, *A History of the Australian Environment Movement*, Cambridge University Press, Cambridge, 1999, p. 247.

<sup>28</sup> Farrell, 'Mining and rangelands', p. 149; Peter Machin, 'New South Wales: Land access agreement between miners and farmers', *Australian Mining and Petroleum Law Bulletin*, vol. 13, no. 4, 1994, p. 144, <http://www.austlii.edu.au/au/journals/AUMPLawB/1994/28.html>, accessed 12 August 2014; G.H. White, O. Morozow, J.G. Allan and C.A. Bacon, 'Minimisation of impact during exploration', in D.R. Mulligan (ed.), *Environmental Management in the Australian Minerals and Energy Industries: Principles and Practices*, University of New South Wales Press, Sydney, 1996, pp. 128-130.

<sup>29</sup> Peter Langkamp, 'Potential conflict between the coal and arable land resources in Australia: a case for corporate responsiveness', *Environmental Management*, vol. 9, no. 1, 1985, p. 49; M.D. Young, 'Pressures for competing uses of the north west pastoral lands of Australia', *Australian Rangeland Journal*, vol. 3, no. 2, 1981, p. 156.

<sup>30</sup> Neil Gunningham, Peter Grabosky and Darren Sinclair, *Smart Regulation: Designing Environmental Policy*, Clarendon Press, Oxford, 1998, pp. 50-51.

<sup>31</sup> Lisa Herbert, 'Santos and AGL sign land access deal with farmers', ABC Rural, 28 March 2014, <http://www.abc.net.au/news/2014-03-28/santos-agl-agreement/5352090>, accessed 1 April 2014.

<sup>32</sup> Muchaparara Musemwa, 'Contestation over Resources: the farmer-miner dispute in colonial Zimbabwe, 1903-1939', *Environment and History*, vol. 15, no. 1, 2009, pp. 79-107.

<sup>33</sup> Alice Gorman, 'The sky is falling: how Skylab became an Australian icon', *Journal of Australian Studies*, vol. 35, no. 4, 2011, p. 536.

political perceptions that the state's criminal laws were insufficient for responding to vandalism.<sup>34</sup> In taking this focus, it is acknowledged that the range of stakeholders involved in disputes around mining in Australia has expanded greatly since the early 1980s, with a far more prominent environment movement today - including their politically unusual alliance with farming groups through the anti-coal seam gas organisation Lock the Gate.<sup>35</sup> Although conservationists were notable for their absence from the negotiations leading to the Guide's creation, their collaboration with farming groups would become significant by the late 1980s with a joint Australian Conservation Foundation-National Farmers' Federation submission seeking government action on soil conservation, culminating in the rise of Landcare – a joint enterprise between farmers and conservationists designed to combat land degradation.<sup>36</sup> Finally, while it is clear that mining and agriculture were both important to the Queensland Government in the 1980s, the relative political significance of mining in comparison to agriculture should be recognised – given the State's multiple interests in mining, its adjudication responsibilities between those interests and the extent to which a State's policy objectives may align with those of industry.<sup>37</sup>

This is not to suggest that environmental protection was absent from the minds of rural lobby groups altogether in the early 1980s, but rather bound up in the task of preserving the landscape as a whole for economic purposes: 'The advent of open-cut mining in highly productive agricultural areas is ... a new development of major significance requiring wise and balanced legislation to protect our agricultural and environmental heritage'.<sup>38</sup> For the Queensland Producers' Federation, the question was one of balance, not exclusion: "I would like to make it clear that there has never been any suggestion that farmer organisations are against mining, or that primary producers wish to restrict fair and reasonable rights of companies to explore and survey land for possible future mining activities".<sup>39</sup> It should also be noted that other contested land-uses, such as forestry, have encountered similar concerns to those engaged in mining when attempting to balance competing public and private benefits, whilst simultaneously striving to achieve improved social, economic and environmental outcomes.<sup>40</sup>

<sup>34</sup> Queensland Law Reform Commission, *A Bill to Make Provision for the Abatement of Litter and Other Purposes*, Report No. 5, Brisbane, 1970, pp. 2-4.

<sup>35</sup> See Guy Pearce, David McKnight and Bob Burton, *Big Coal: Australia's Dirtiest Habit*, University of New South Wales Press, Sydney, 2013; Paddy Manning, *What the Frack? Everything You Need to Know About Coal Seam Gas*, University of New South Wales Press, Sydney, 2012; ABC Australian Story, 'Lock Me Away', broadcast 4 August 2014, <http://www.abc.net.au/austory/specials/lockmeaway/default.htm>, accessed 5 August 2014.

<sup>36</sup> Linda Courtenay Botterill, 'Policy change and network termination: the role of farm groups in agricultural policy making in Australia', *Australian Journal of Political Science*, vol. 40, no. 2, 2005, p. 216.

<sup>37</sup> I.D. Alfredson, 'Policy objectives of mining legislation and the Queensland review', *Australian Mining and Petroleum Law Association Yearbook*, 1987, pp. 58-59, <http://www.austlii.edu.au/au/journals/AUMPLawAYbk/1987/7.html>, accessed 1 April 2014.

<sup>38</sup> Don Eather (General President of the Queensland Graingrowers Association) to Ivan Gibbs (Minister for Mines and Energy), 2 September 1981, QSA, item 1239143.

<sup>39</sup> F.V. Esdale (Secretary, Queensland Producers' Federation) to Michael Ahern (Minister for Primary Industries), 2 March 1982, QSA, item 1239143.

<sup>40</sup> Kathryn J.H. Williams, 'Public acceptance of plantation forestry: implications for policy and practice in Australian rural landscape', *Land Use Policy*, vol. 38, 2014, pp. 346-354.

The place of Indigenous Australians in these debates must also be acknowledged, given their involvement with coal mining and coal seam gas extraction in both pro and anti-industry capacities.<sup>41</sup> While the Queensland Grain Growers Association and the Queensland Chamber of Mines did not include any Indigenous stakeholders in their discussions around land access, these negotiations took place during a time of frequent controversy over the desire of the Bjelke-Petersen government (1968-87) to promote mining development at the expense of both environmental protection and the aspirations for land rights amongst Indigenous people of the State. This was demonstrated, for example, with bauxite development at Aurukun in Far North Queensland in the late 1970s.<sup>42</sup> Circumstances have evolved with the recognition of native title by the High Court of Australia in the 1992 *Mabo* decision and their subsequent *Wik* determination in 1996, which found that native title could coexist with particular types of pastoral leases – with Indigenous customary tenure only being extinguished to the extent of any inconsistency with the rights of the pastoral lessee.<sup>43</sup> A political furor erupted in the aftermath of the judgment and amendments to the Commonwealth's *Native Title Act* were passed in 1998 to give 'new statutory comfort [to pastoralists] that any native title that might exist on their leases could not interfere with any of their activities'.<sup>44</sup>

One current example of direct involvement by Indigenous people in coal and coal seam gas development proposals can be seen at Mount Mulligan (Nguddaboolgan) – 100 kilometres west of Cairns (a site infamous as the scene of Queensland's worst land disaster in 1921).<sup>45</sup> The Djungan People have held native title interests at the site since 2012 and in 2013 seemingly executed a legally mandated Conduct and Compensation Agreement with the Perth-based Mantle Mining Corporation, thus permitting the company access to their land for exploration purposes.<sup>46</sup> Yet there is community division as to whether or not the company has a social licence to operate, with ongoing concerns regarding the potential for contamination of underground water aquifers due to exploration activities.<sup>47</sup> The above context thus provides a sufficient grounding upon which

<sup>41</sup> Paul Cleary, *Mine-Field: The Dark Side of Australia's Resources Rush*, Black Inc, Collingwood, 2012, pp. 123-140.

<sup>42</sup> Colin Hughes, *The Government of Queensland*, University of Queensland Press, Brisbane, 1980, pp. 293-296, <http://espace.library.uq.edu.au/view/UQ:189638>, accessed 12 August 2014.

<sup>43</sup> *Mabo v Queensland (No. 2)* (1992) 175 CLR 1; *Wik Peoples v Qld* (1996) 187 CLR 1.

<sup>44</sup> David Ritter, *Contesting Native Title: From Controversy to Consensus in the Struggle Over Indigenous Land Rights*, Allen and Unwin, Crows Nest, 2009, p. 115.

<sup>45</sup> Peter Bell, *Alas It Seems Cruel: The Mount Mulligan Coal Mine Disaster of 1921*, Boolarong Press, Brisbane, 2013.

<sup>46</sup> *Archer on Behalf of the Djungan People #1 v State of Queensland* [2012] FCA 801, 2 August 2012, <http://www.austlii.edu.au/au/cases/cth/FCA/2012/801.html>, accessed 30 May 2014; Queensland Government, 'Djungan People's Native Title Rights Recognised', <http://statements.qld.gov.au/Statement/Id/80044>, accessed 10 June 2014; Mantle Mining Corporation, 'Positive Progress Achieved at Mount Mulligan', 13 November 2013, <http://www.mantlemining.com/wp-content/uploads/2013/11/1276782.pdf>, accessed 30 July 2014; *Petroleum (Production and Safety) Act 2004* (Qld), ss 532-533.

<sup>47</sup> Kylie Reghenzani and Kimberley Vlasic, 'Coal seam gas protest at Mareeba over exploration on site of mining disaster', *The Cairns Post*, 29 May 2014, <http://www.cairnspost.com.au/news/coal-seam-gas-protest-at-mareeba-over-exploration-on-site-of-mining-disaster/story-fnjpvlp-1226935955114>, accessed 1 June 2014; North Queensland Lock the Gate Alliance Affiliate Group, email 9 June 2014.

to proceed with a brief overview of mining law as it relates to land access concerns and the formulation of the Code and Guide.

### Land access legal background

Historically, coal resources were bundled together with freehold grants to land for landholders, permitting them access (at common law) to both subsurface metals and topsoil rights. Exceptions to this were gold and silver, unless the Crown had reserved the right to the minerals in a deed of grant.<sup>48</sup> Eventually the various Australian states (at that time colonies) ‘set about recapturing coal rights from old property holdings, and stripping them from new land grants’.<sup>49</sup> Queensland took several decades to formally reserve coal resources for the Crown in the *Mining on Private Land Act 1909* - including the Crown’s right to access land to engage in ‘searching for or working on any mines’.<sup>50</sup> Prior to this the State had largely (with the exception of gold) been content to dispose of land for the purposes of mining, thereby permitting the property in the minerals to pass to the freeholder.

By reserving petroleum resources,<sup>51</sup> the Crown authorises the grant of titles (exploration and production licences) over land owned in fee simple (a type of freehold interest) or held as leasehold estates. Accordingly mining titles can be issued over privately-held freehold land, native title holdings and Crown leases. Crown leasehold ownership is common in rural Australia – with a long history as a flexible policy instrument to secure economic and social development.<sup>52</sup> It must be emphasised that land granted in fee simple does not equate to absolute ownership, as it remains subject to the doctrine of tenure – the idea being that ultimately the Crown owns all land and is charged with granting interests in land to landholders.<sup>53</sup> Title to petroleum resources is generally transferred from the Crown to a mining company with the issue of a licence and ‘ownership’ of that resource changes from the Crown to the company (titleholder) at the well-head, ‘which is also when royalties are calculated and paid [to the State]’.<sup>54</sup>

Landholders (including Indigenous native titleholders) must negotiate land access and compensation agreements with mining titleholders - namely coal and coal seam gas companies.<sup>55</sup> Should the parties fail to reach agreement, or if access is denied to the titleholder, arbitration and

<sup>48</sup> *Case of Mines* (1568) 75 ER 472.

<sup>49</sup> Anthony Scott, *The Evolution of Resource Property Rights*, Oxford University Press, Oxford, 2008, p. 341.

<sup>50</sup> S. Christensen, P. O’Connor, W. Duncan and R. Ashcroft, ‘Early land grants and reservations: any lessons from the Queensland experience for the sustainability challenge to land ownership’, *James Cook University Law Review*, vol. 15, 2008, p. 65, <http://www.austlii.edu.au/au/journals/JCULawRw/2008/3.html>, accessed 12 August 2014.

<sup>51</sup> *Petroleum Act 1923* (Qld), s 9; *Petroleum and Gas (Production and Safety) Act 2004* (Qld), s 26.

<sup>52</sup> John Holmes, ‘Pastoral Lease Tenures as Policy Instruments, 1847-1997’, in Dovers (ed.), *Environmental History and Policy: Still Settling Australia*, pp. 212-242.

<sup>53</sup> Weir and Hunter, ‘Property rights and coal seam gas extraction’, pp. 71-83.

<sup>54</sup> Deborah Kerr, ‘Property rights, agriculture and the coal seam gas industry’, in N. Taylor (ed.), *Australia’s Unconventional Energy Options*, Committee for Economic Development of Australia, Melbourne, September 2012, p. 45, <http://ceda.com.au/media/263565/cedaunconventionalenergyfinal.pdf>, accessed 10 August 2014.

<sup>55</sup> S. Christensen, P. O’Connor, W. Duncan and A. Phillips, ‘Regulation of land access for resource development: a coal seam gas case study from Queensland’, *Australian Property Law Journal*, vol. 21, no. 2, 2012, pp. 110-146; *Native Title Act 1993* (Cth), s 25.

litigation may follow – with the potential for an ‘eventual court determination requiring access based upon the terms determined by the court or arbitrator’.<sup>56</sup> Once extracted, coal and coal seam gas become the property of the titleholder – rather than the landholder.<sup>57</sup> The right to exclude others from one’s premises is of course fundamental to the ownership of real property, with the absence of consent (whether implied or express) ushering in a possible action in trespass.<sup>58</sup> However, petroleum titleholders already have this consent via the relevant Act and therefore this entitlement is largely voided in New South Wales and Queensland.<sup>59</sup> While coal seam gas has been referred to as ‘the modern property law conundrum’,<sup>60</sup> a link to the past behaviour of the mining industry in relation to Indigenous native title can certainly be made:

Ironically, the exercise by miners of CSG rights is in direct contrast to the mining industry’s widely publicised untruthful objections to native title following the *Mabo* and *Wik* decisions. Aggressive national campaigns were run at the time, warning freehold landowners of the threat that native title posed to the maintenance and exercise of private property rights. Native title, that most fragile of all property rights, was never contemplated as being in competition with freehold title in spite of the miners’ claims. In contrast, CSG rights directly and explicitly collide with what ... [Sir William Blackstone called] ‘the highest and most extensive interest that a man [*sic*] can have’ in land.<sup>61</sup>

In an attempt to alleviate understandable community disquiet, land access arrangements have been introduced in Queensland in various guises – one early example being the Guide. The political climate in which this document was produced is canvassed below.

<sup>56</sup> Weir and Hunter, ‘Property rights and coal seam gas extraction’, p. 74.

<sup>57</sup> *Petroleum and Gas (Production and Safety) Act 2004* (Qld), s 28.

<sup>58</sup> For example, *Plenty v Dillon* (1991) 171 CLR 635.

<sup>59</sup> Weir and Hunter, ‘Property rights and coal seam gas extraction’, p. 78; *Petroleum (Onshore) Act 1991* (NSW), s 28A; *Petroleum and Gas (Production and Safety) Act 2004* (Qld), s 108.

<sup>60</sup> Weir and Hunter, ‘Property rights and coal seam gas extraction’, pp. 71-83.

<sup>61</sup> Kate Galloway, ‘Landowners’ vs miners’ property interests: the unsustainability of property as dominion’, *Alternative Law Journal*, vol. 37, no. 2, 2012, p. 79.

### Seeking amendments and more

Before exploring the development of the Guide and its contents, it is first necessary to understand the wider political environment that surrounded calls for changes to Queensland's *Mining Act*. Reform efforts were made at a time of growth for the state's export coal industry, with the exploration of the Bowen Basin presenting much promise. Schooled in the policy priorities of the Nicklin government before it (1957-68), the Bjelke-Petersen administration saw the State's role as a facilitator of 'development'. To this end, state-supported infrastructure for the transportation and export of resources was a deliberate strategy adopted by government to encourage mining exploration and foreign investment.<sup>62</sup> Alongside Victoria, Queensland had earned a reputation as a land of open-cut coal mines by the 1980s, with the Sunshine State seeing significant population growth in several mining centres in the 1970s as a result.<sup>63</sup> Against this favourable background, by mid-1980 Queensland had 43 coal mines in operation, 22 of which were open-cut.<sup>64</sup>

Preferential treatment of mining operations ahead of other areas of public policy, namely environmental protection, is widely acknowledged in the literature concerning the Bjelke-Petersen era. But it should be said that anti-environmentalism and a pro-development focus was not a uniquely Queensland 'state of mind' in the 1970s and 1980s – with similar stances taken by governments throughout Australia, albeit with variations in degree.<sup>65</sup> Studies of Queensland's environmental politics and policy-making from the 1990s to the present would suggest that political affiliation (Labor or Liberal/National party) has mattered little to the enduring 'growth first' message of government.<sup>66</sup> The attempt to reform Queensland's mining legislation through industry consultation in the late 1970s and early 1980s was therefore a moment in which

<sup>62</sup> John Wanna and Tracey Arklay, *The Ayes Have It: The History of the Queensland Parliament, 1957-1989*, ANU E-Press, Canberra, 2010, pp. 446-448, <http://press.anu.edu.au/apps/bookworm/view/The+Ayes+Have+It%3A+The+history+of+the+Queensland+Parliament%2C+1957%E2%80%931989/7001/upfront.xhtml>, accessed 12 August 2014.

<sup>63</sup> Joseph Powell, *An Historical Geography of Modern Australia: The Restive Fringe*, Cambridge University Press, Cambridge, 1988, p. 269; Joseph Powell, *Plains of Promise, Rivers of Destiny: Water Management and the Development of Queensland 1824-1990*, Boolarong, Brisbane, 1991, p. 312.

<sup>64</sup> Fitzgerald, *From 1915 to the early 1980s*, p. 335.

<sup>65</sup> For example, David J. Turton, 'Wading in: environmental governance and Queensland's Clean Waters Act 1971', *James Cook University Law Review*, vol. 17, 2010, pp. 46-82, <http://www.austlii.edu.au/au/journals/JCULawRw/2010/3.html>, accessed 23 April 2014; Aynsley Kellow and Simon Niemeyer, 'The Development of Environmental Administration in Queensland and Western Australia: Why are they Different?', *Australian Journal of Political Science*, vol. 34, no. 2, 1999, pp. 205-222; Peter Grabosky and John Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies*, Oxford University Press, Melbourne, 1986, pp. 27-52, [http://www.anu.edu.au/fellows/jbraithwaite/\\_documents/Manuscripts/Of\\_Manners\\_Gentle.pdf](http://www.anu.edu.au/fellows/jbraithwaite/_documents/Manuscripts/Of_Manners_Gentle.pdf), accessed 12 August 2014; Fitzgerald, *From 1915 to the early 1980s*, pp. 388-438; Wanna and Arklay, *The Ayes Have It*, p. 430; Tim Bonyhady, *Places Worth Keeping: Conservationists, Politics and Law*, Allen and Unwin, Sydney, 1993.

<sup>66</sup> Ciaran O'Faircheallaigh, 'Evaluating Performance on the Environment', in Bron Stevens and John Wanna (eds.), *The Goss Government: Promise and Performance of Labor in Queensland*, Macmillan, Melbourne, 1993, pp. 248-267; Michael Briody and Tim Prenzler, 'The enforcement of environmental protection laws in Queensland: a case of regulatory capture?', *Environmental and Planning Law Journal*, vol. 15, no. 1, 1998, pp. 54-71; Paul Norton, 'Environmental politics and policy in Queensland under Labor, 1998-2012', *Queensland Review*, vol. 20, no. 1, 2013, pp. 52-68; Alexandra Mercer, Kim de Rijke and Wolfram Dressler, 'Silences in the boom: coal seam gas, neoliberalizing discourse, and the future of regional Australia', *Journal of Political Ecology*, vol. 21, 2014, pp. 279-302, [http://ipe.library.arizona.edu/volume\\_21/Mercer.pdf](http://ipe.library.arizona.edu/volume_21/Mercer.pdf), accessed 12 August 2014.

government was prepared to acknowledge that agriculture and mining both had a role to play in the economic development of the State.

Emerging out of the Queensland National Party's Annual Conference in July 1978,<sup>67</sup> a legislative streamlining agenda was posed for 'the entry upon and acquisition of land for the purposes of exploration and mining'.<sup>68</sup> Following on from the conference, a resolution to the party's State Management Committee created a select committee to 'investigate mining development as it affects rural lands, with a view to consolidating previous submissions and including such additional recommendations where need was demonstrated by the committee's enquiries'.<sup>69</sup> After holding public meetings at various centres and taking submissions from many farming organisations, mining companies and individual landholders, the Rural Policy Committee released its findings for the consideration of government on 25 September 1981.

The Report suggested a variety of possible amendments, including the replacement of the Mining Warden's Court with a Queensland Land Court, the development of a new Authority to Prospect for entry on to private land, increased bond requirements for mining companies to compensate for possible damage to landholders' property, and a recommendation that the calculation of fair market value compensation for landholders include a 'social disturbance' factor.<sup>70</sup> While the Report and Bill were focussed on mining in rural areas of Queensland, both documents provoked some observers to press for improvements to the planning process for mining near urban centres. The Labor Opposition member for Ipswich West, David Underwood, convened a seminar of local government authorities and mining companies to discuss the issue – although the Minister for Mines and Energy, Ivan Gibbs (Fig. 1), declined an invitation to attend.<sup>71</sup> Already a known voice on urban environmental matters in the Labor party,<sup>72</sup> Underwood expressed particular concern at a seeming lack of coordination between local government authorities and the Mines Department when planning residential development in areas with coal reserves. He urged that a resource management study be implemented for the West Moreton region (close to Brisbane) in order to cope with the industry's expected future growth.<sup>73</sup>

Beyond the Report's recommendations, three years of consultations with rural organisations and mining companies also revealed problems with mining sub-contractors opening fences and pushing down trees on to properties without the permission of landholders.<sup>74</sup> Troubled by these developments, in 1980 the Queensland Grain Growers Association produced the booklet *Mining and the Farmer: A Farmers' Guide to Provisions of the Mining Act*, distributing this to other rural

<sup>67</sup> Gay Davidson, 'Easier to anticipate, but harder to explain', *Canberra Times*, 24 July 1978, p. 21.

<sup>68</sup> Queensland National Party Rural Policy Committee, *Report: The Effects of Mining Development, Acquisition and Resumption of Rural Lands in Queensland*, 25 September 1981, pp. 1-2, QSA, item 1239143.

<sup>69</sup> Queensland National Party Rural Policy Committee, *Report*, p. 1, QSA, item 1239143.

<sup>70</sup> Queensland National Party Rural Policy Committee, *Report*, p. 4, 8, 11, QSA, item 1239143.

<sup>71</sup> 'How to plan mining', *Courier Mail*, 6 December 1981, p. 42.

<sup>72</sup> Turton, 'Wading in', p. 57.

<sup>73</sup> Queensland Parliamentary Debates, Legislative Assembly, vol. 287, 23 March 1982, pp. 4979-82.

<sup>74</sup> Robbins, 'Nationals bid', p. 3.



organisations, including the sugar industry.<sup>75</sup> While this publication lacked input from the mining industry itself, it was designed to encourage farmers to seek assistance in their negotiations with mining operators (Fig. 2).

Additional complaints of soil erosion caused by mining surveys were raised in the months after the National Party's Report had been submitted to the government.<sup>76</sup> These incidents caused the Queensland Grain Growers Association to convene a meeting with the Queensland Chamber of Mines to improve industry awareness and advocate caution. Difficulties included 'an extremely badly managed seismic survey at Goondiwindi and a similarly badly managed coal survey at Daandine near Dalby [in 1981]. Both had created ... serious erosion hazards as well as tremendous disruption to the landholders concerned'.<sup>77</sup>



**Figure 1:** Ivan Gibbs (right), Minister for Mines and Energy and National Party MLA for Albert, with Logan City Council Alderman, Ian Thomas, 1983. Source: Logan City Council.

While the issue of mining and agriculture proximity was raised when the Mining Act and Other Acts Amendment Bill was first presented to Parliament in December 1981,<sup>78</sup> the Department of Primary Industries had been conscious of this for some time. Dr Graham Alexander, Director-General of the Department, was keenly aware of the risks and rewards presented by the State's mineral expansion and saw fit to remark on this as one of the many challenges facing the agricultural sector as it greeted the 1980s:

The renewed interest and capital investment in mining represents very much a mixed bag for Queensland agriculture. Mining competes for land, water and labour resources but also creates market demand for some agricultural

<sup>75</sup> Queensland Grain Growers Association, 'Mining and the farmer: a farmer's guide to provisions of the Mining Act', *Australian Canegrower*, vol. 3, no. 8, 1981, pp. 80-82.

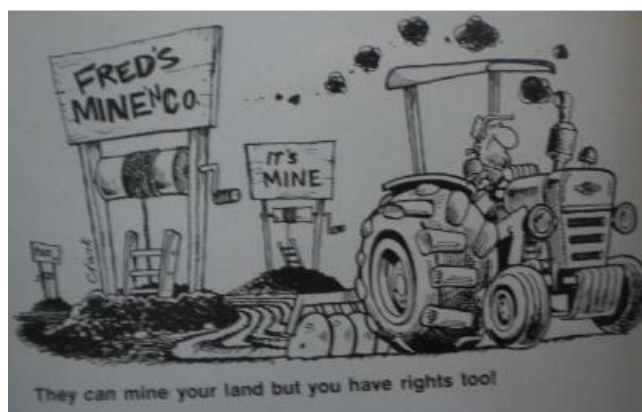
<sup>76</sup> Newspaper clipping, 'Farmers hit out at miners', *Courier Mail*, dated 23 November 1981, QSA, item 1239143.

<sup>77</sup> Queensland Grain Growers Association to Queensland Producers' Federation, 13 November 1981, QSA, item 1239143.

<sup>78</sup> Queensland Parliamentary Debates, Legislative Assembly, vol. 286, 1 December 1981, pp. 4208-11

commodities in localised areas. Moreover, agriculture is likely to reap some external economies through the provision of better transport facilities and in the development of improved electricity and communications systems.<sup>79</sup>

As the newly-appointed Minister for the Department of Primary Industries in 1980, Michael Ahern, was particularly mindful of the need to be receptive to the concerns of the rural sector, with its many pressure groups enthusiastic about participating in what was a significant policy domain for the Queensland National Party.<sup>80</sup> Ahern expressed the hope that both mining and agricultural industries could compromise effectively for mutual benefit, when opening a conference on the subject at Biloela in central Queensland for the Australian Institute of Agricultural Science on 6 May 1981. Ahern urged the conference participants to work towards devising a 'rational approach' to coexistence – stressing the significance of both sectors to the Queensland economy.<sup>81</sup> It would seem that the government did not wish to be drawn into the arguments of the parties. A desire for distance between government and disputes between mining and agricultural interests was not peculiar to Queensland, as authorities in colonial Zimbabwe adopted a similar 'hands off' approach in the early twentieth century in contests between non-indigenous farmers and gold miners over timber and water exploitation. The State confined itself to an observer status for several decades before introducing conservation legislation.<sup>82</sup>



**Figure 2:** Mining law education was a priority for farming organisations. Source: *Australian Canegrower*, September 1981, p. 80.

Prior to Parliament's consideration of amendments to the *Mining Act* in December 1981, the Queensland Grain Growers Association pressed the Minister for Mines and Energy, Ivan Gibbs, to replace 'Permits to Enter' for exploration activities under the Act with what it called a 'Prospecting Agreement'. It saw the Agreement as an opportunity for a court to initially assess a mining operator's work program before exploration began, thereby putting the landholder in an improved negotiating position. The Agreement would include measures that took account of

<sup>79</sup> Alexander, 'Agriculture gears up', p. 291.

<sup>80</sup> Paul Reynolds, *Lock, Stock and Barrel: A Political Biography of Mike Ahern*, University of Queensland Press, Brisbane, 2002, p. 57; Wanna and Arklay, *The Ayes Have It*, pp. 443-446.

<sup>81</sup> Michael Ahern, 'Foreword', in G.A. Thomas, J. Standley and M.N. Hunter (eds.), *Proceedings of the 2<sup>nd</sup> Annual Symposium of the Central Queensland Sub-Branch of the Australian Institute of Agricultural Science: Agriculture/Mining – Conflict or Co-Operation in Capricornia?*, held 6 May 1981, Biloela, np.

<sup>82</sup> Musemwa, 'Contestation over resources', p. 93.

erosion and rehabilitation, compensation, exploration methods and the timing of that work – including any agreement for repairs where necessary.<sup>83</sup> However, Gibbs believed the proposed Agreement would be ‘unworkable because of the large number of Authorities to Prospect which are in force for minerals, compared to a much small number of Petroleum Authorities, where [the measures proposed by the Association were] already provided for’. The Association countered that the ‘Prospecting Agreement we are proposing would really only formalise the voluntary convention which we are negotiating with the Chamber of Mines, with every chance of success’.<sup>84</sup> Their arguments were to no avail and the Association was left disappointed with the omission of their suggestion from the Act – but saw the mining industry as being more cooperative than government in its willingness to resolve ‘problems before they arise’.<sup>85</sup>

Having left the Minister unconvinced of their case, formal negotiations between the Queensland Grain Growers Association and the Queensland Chamber of Mines were entered into on 11 November 1981. The Chamber was initially ‘somewhat sceptical about the need for guidelines’ to manage the relationship between mining operators and landholders during the exploration phase – viewing the problems raised by farmers as relevant to a few isolated incidents involving sub-contractors. However, company representatives from both the coal and petroleum industries conceded during the meeting that ‘most of the difficulties experienced were due to lack of communication between company management and their field operators’. The Chamber’s delegation was ultimately convinced that the disruption caused by the operations of mining survey companies was unacceptable – endeavouring ‘to recommend to their organisation that they co-operate with ... [the Association] in developing a convention or code of ethics relating to prospecting’. By the conclusion of the meeting, the Association was satisfied that there was a ‘good prospect of our agreeing on a standard form of prospecting agreement which could be voluntarily adopted irrespective of what happens to the Mining Act’.<sup>86</sup>

In the months that followed, the Chamber took the Association’s draft guidelines for landholder/miner relations and adapted them to a format deemed acceptable to member companies. It earned the respect of the Association by strengthening the document ‘in some respects’. The Chamber then circulated the proposed ‘Guidelines for Exploration’ among its members, ‘giving them the opportunity to endorse it and so have their names listed as subscribing to the convention’.<sup>87</sup> Ivan Gibbs was made aware of these developments and highlighted them when addressing the State Council of the Queensland Cane Growers’ Association at Toowoomba

<sup>83</sup> Queensland Producers’ Federation Position Paper on Mining Act Amendments, November 1981, QSA, item 1239143; Eather to Gibbs, 25 February 1982, QSA, item 1239143.

<sup>84</sup> Eather to Gibbs, 5 March 1982, QSA, item 1239143.

<sup>85</sup> Newspaper clipping, “Disappointed” with Act Amendments’, *Graingrower*, dated 31 March 1982, QSA, item 1239143; newspaper clipping, ‘Mining Act Changes Fall Short’, *Country Life*, dated 18 March 1982, QSA, item 1239143.

<sup>86</sup> Queensland Grain Growers Association to Queensland Producers’ Federation, 13 November 1981, QSA, item 1239143.

<sup>87</sup> G.T. Houen, General Manager, Queensland Graingrowers Association, to Queensland Producers’ Federation, 29 April 1982, QSA, item 1239143.

in April 1982. In praising the forging of a new spirit of accommodation and trust between producer organisations and the Chamber of Mines, Gibbs conceived of a 'new era of co-operation' between mining and agricultural interests, driven by both industries breaking new ground and the increased 'necessity for both parties to live together'.<sup>88</sup> Having gained the attention of the Minister, the Queensland Grain Growers Association also asked Gibbs to adopt the Guide 'as the rules of behaviour and performance expected of those who hold Authorities to Prospect'.<sup>89</sup>

The Guide was released in late June 1982 and the Chamber of Mines saw the document's production as 'a really worthwhile exercise in ensuring that relations between the two important primary industries remains at the very satisfactory level of recent years'.<sup>90</sup> The Guide placed a clear emphasis on mining companies assuming responsibility for promoting better relationships between themselves and farmers. In responding to questions from the media, the Executive Director of the Queensland Chamber of Mines, Michael Pinnock, agreed that the Guide's provisions 'would add to development and exploration costs' in some instances, but stressed that the Guide was a necessity and that the Chamber's members were unanimous in their support for the document.<sup>91</sup> For its part, the Queensland Grain Growers Association regretted that the Guide's preparation 'took place in such a way that ... other producer organisations did not have the opportunity to participate ... [but hoped it was] acceptable' – and sought the opinion of these other groups to pinpoint any problems with the Guidelines as they stood.<sup>92</sup> While this raises questions about the quality of stakeholder involvement in the process, when evaluating the progress made in fostering an improved relationship between farmers and miners by August 1982, the General Manager for the Queensland Grain Growers Association, G.T. Houen, concluded:

Many of our growers would have believed two years ago that the system was stacked against them, with the Government and the mining companies in league with each other and mining companies enjoying political patronage. But I think they would now be more confident about their position in the light of the co-operation which the Chamber of Mines has extended to Queensland Graingrowers and other producer organisations. The recent release of our joint 'Explorer-Landholder Procedures' booklet is a milestone.<sup>93</sup>

Although soil erosion remained an ongoing challenge for grain growers,<sup>94</sup> by 1984 mining and farming groups both agreed that 'overall, communications between groups [were] much improved by industry action rather than Government intervention'.<sup>95</sup> Although government had not taken a role in formulating the Guide, it inadvertently brought the Chamber and Association together to create the document, through its refusal to adopt the Association's recommendation

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<sup>88</sup> 'Minister calls on miners and farmers to co-operate', *Queensland Government Mining Journal*, vol. 83, no. 967, May 1982, p. 211.

<sup>89</sup> Houen to Queensland Producers' Federation, 29 April 1982, QSA, item 1239143.

<sup>90</sup> T.L. Wren, Queensland Chamber of Mines, to Esdale, 23 June 1982, QSA, item 1239143.

<sup>91</sup> 'Now mining teams and landholders really can be friends', *Courier Mail*, 22 June 1982, p. 21.

<sup>92</sup> Houen to Queensland Producers' Federation, 29 April 1982, QSA, item 1239143.

<sup>93</sup> Houen, 'Mining, Agricultural or Grazing Land', p. 1.

<sup>94</sup> John Bradsen, 'Soil Conservation: History, Law, and Learning', in Dovers, *Environmental History and Policy*, p. 286.

<sup>95</sup> Minutes of Miners/Farmers Meeting, 3 August 1984, QSA, item 1239143.

for a formal ‘Prospecting Agreement’. Clearly, the parties saw the Guide as a moment of significance, yet what did the pamphlet offer by means of managing coexistence and how is this document relevant to the Queensland Land Access Code 2010? From the information presented above, the Guide provides historical context for modern-day discussions of the Code, as the latest example of a long line of voluntary frameworks for positive land use. It provokes questions about the merits or otherwise of voluntary guidelines for managing stakeholder behaviour, the extent to which mining companies placed value in building positive community relationships, and the requirements for entering into a social licence to operate. Therefore, the next section will examine the Guide’s objectives.

### **The Guide’s purpose**

With the ultimate goal of ensuring ‘satisfactory working relationships’, the Guide sought to enshrine some general principles into the mining exploration process. These comprised close liaison with all landholders affected by exploration; minimising damage to infrastructure, vegetation and land; minimising disturbance to landholders and livestock; rectifying, without undue delay, any damage which could be reasonably repaired; promptly paying the landholder for any agreed damages; and abiding by additional ‘Explorers Procedures’. These Procedures were premised on a mining exploration company selecting a key individual ‘with an affinity for people on the land, and if possible, a knowledge of farming and grazing practice to be the Field Supervisor for the [exploration] survey’. The Field Supervisor envisioned by the Guide would be an employee of the exploration company and would therefore have knowledge of all aspects of the survey, allowing them to ‘inspect the area well in advance and pre-plan the survey to cause minimum disturbance to the land-holder and damage to his [*sic*] property’. Aside from this project knowledge, the Guide emphasised the value in a Field Supervisor engaging in direct contact with a landholder prior to a company’s entry on to a property, allowing them to discuss the plans for exploration – including the location of potential problems such as ‘buried water pipes, contour banks, shade clumps, erosion prone land ... gates and fences’. In view of the previous concerns with mining sub-contractors, the Guide stressed that ‘contractors and subcontractors [should be] aware of company policy in the field and ensure that as far as practicable it is here adhered to ... [It was also noted that] the tenement holder and operator have the [ultimate] responsibility for the operation’.<sup>96</sup>

Looking beyond the importance of effective professional relationships between landholders and miners, the Guide contained other points of note, such as ensuring that local government authorities were aware of the survey operation being carried out, the use of vehicles on roads (including any repairs to roads as a result of essential movement during wet weather), the cleaning of vehicles to prevent the spread of weeds, and the flexible positioning of bores to ‘reduce to a minimum the destruction of trees and the creation of erosion hazards’. The landholder was to be

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<sup>96</sup> Brochure, Explorer-Landholder Procedures: A Common-Sense Guide to Good Relations Between Miners and Farmers, 1982, QSA, item 1239143.

invited ‘to inspect the work area’ when the project was complete ‘so that any problems can be discussed’. Disturbance to the soil’s surface was to be minimised wherever possible, ‘particularly on cultivated land’. When damage did occur, the Guide saw the Field Supervisor’s role as one of negotiator, with the authority to ‘finalise compensation/restoration with the minimum of delay’.<sup>97</sup> While endorsed by the Queensland mining industry in general, the document itself was of a voluntary nature. Although the Guide lacked the statutory authority of the present-day land access regime, as will be shown below, both relied upon an expectation of goodwill between the parties.

### **Land Access Code implementation**

In contrast to the Guide, where government involvement was minimal, the Queensland Land Access Code owes its existence to the creation of a Land Access Working Group (LAWG) in 2008. Comprised of representatives from the State Government, agricultural and resources sectors, the LAWG was charged with formulating solutions to land access issues and improving relationships between the resources and agricultural industries – developing Queensland’s *Land Access Policy Framework 2009* and identifying deficiencies in the existing legislative framework.<sup>98</sup> The Land Access Code is one resulting reform from that process and indeed replaced the *Queensland Mining, Petroleum and Gas, Geothermal and Greenhouse Gas Storage Land Access Code* and the *Code of Conduct – Procedures for Sound Landholder/Explorer Relations*.<sup>99</sup> There are, however, several similarities between the Guide and Land Access Code. In imposing ‘a higher standard of behaviour on resource companies’ than had existed previously, the announcement of the present Code by the then Minister for Natural Resources, Mines and Energy, Stephen Robertson, echoed earlier sentiments from the 1980s: ‘The co-existence of both [mining and agricultural] sectors is fundamental to Queensland’s future economic prosperity and I am confident that improved transparency, equity and communication will help foster and maintain good relations between all parties.’<sup>100</sup>

The Code is applicable to all Queensland resources legislation that deals with authorised activities on private land: the *Mineral Resources Act 1989*, *Petroleum and Gas (Production and Safety) Act 2004*, *Petroleum Act 1923*, *Greenhouse Gas Storage Act 2009* and the *Geothermal Energy Act 2010*.<sup>101</sup> In this respect alone, the Code is far wider in its application than the Guide, as the latter was concerned solely with Authorities to Prospect under the *Mining Act* – the predecessor of the *Mineral Resources Act 1989*. Unlike the Guide, the Land Access Code is a

<sup>97</sup> Brochure, *Explorer-Landholder Procedures: A Common-Sense Guide to Good Relations Between Miners and Farmers*, 1982, QSA, item 1239143.

<sup>98</sup> James Plumb and Laura Letts, ‘Land access and compensation in Queensland’, *Australian Resources and Energy Law Journal*, vol. 30, no. 1, 2011, p. 113.

<sup>99</sup> Queensland Government, *Guide to Queensland’s New Land Access Laws*, Department of Employment, Economic Development and Innovation, Brisbane, November 2010, p. 2, [http://mines.industry.qld.gov.au/assets/land-tenure-pdf/6184\\_landaccesslaws\\_guide\\_print.pdf](http://mines.industry.qld.gov.au/assets/land-tenure-pdf/6184_landaccesslaws_guide_print.pdf), accessed 12 August 2014.

<sup>100</sup> ‘Companies urged to adopt new Land Access Code’, *Queensland Government Mining Journal*, no. 1239, Winter 2010, pp. 6-7.

<sup>101</sup> Queensland Government, *Land Access Code*, p. 1, 3.

creature of statute.<sup>102</sup> While the Act supports the resolution of conflicts between coal seam gas, other mining and petroleum tenures<sup>103</sup> – it is silent on the protection of non-mining private property rights.<sup>104</sup>

The Code's purposes are twofold: '(a) ... [to state] best practice guidelines for communication between the holders of authorities and owners and occupiers of private land; (b) [to impose] on the authorities mandatory conditions concerning the conduct of authorised activities on private land'.<sup>105</sup> Part 2 of the Code is devoted to non-mandatory provisions, concerned with general principles to foster good relations between the parties. Like its Guide predecessor, close liaison with landholders is expected of the holder of a resource authority under the Code. Early warning of activities and prompt rectification of damage is also expected. In addition, the Code advises that a mining operator should 'regard as confidential information obtained about landholder's operations'.<sup>106</sup> A landholder is expected to liaise with an authority holder in good faith; engage with the holder of an authority 'to identify issues such as values of property and operational considerations'; 'respect the rights and activities of holders and provide reasonable access', negotiate with the resource authority to arrive at suitable conduct and compensation arrangements; and regard information obtained about the holder's operations as confidential.<sup>107</sup> Other provisions for communication, negotiating agreements and the carrying out of activities by the authority holder replicate many of the points raised in the Guide (such as appointing a field supervisor or site manager to liaise with the landholder), but unlike the Guide, there is an emphasis on the landholder accepting responsibility 'to actively engage with the [authority] holder and make time available to discuss relevant issues'.<sup>108</sup>

Part 3 of the Code contains mandatory conditions for the holders of resource authorities. This part of the Code is concerned with tenures under the relevant resources legislation mentioned above and requires that authority holders (and all those acting for them) undertake induction training to ensure awareness of their obligations under resources legislation, the Code and any agreements between themselves and the landholder. Access points for entering on to a landholder's property are given particular attention under the Code – with a special emphasis on avoiding interference with a landholder's business activities and repairs to any damage resulting from the use of roads and tracks. Minimal disturbance is a theme extended to livestock, the use of grids, fences and gates, with immediate notification of any changes being a significant element of the Code.<sup>109</sup> An explicit obligation to prevent the spread of declared pests extends the general duty of the Guide from one based on simply being 'aware' of weed infestation and livestock

<sup>102</sup> *Petroleum and Gas (Production and Safety) Act 2004* (Qld), s 24A; *Petroleum and Gas (Production and Safety) Regulation 2004* (Qld), r 4A and sch 1A.

<sup>103</sup> *Petroleum and Gas (Production and Safety) Act 2004* (Qld), s 295.

<sup>104</sup> Galloway, 'Landowners' vs Miners' Property Interests', p. 79.

<sup>105</sup> *Petroleum and Gas (Production and Safety) Act 2004* (Qld), s 24A.

<sup>106</sup> Queensland Government, *Land Access Code*, p. 4.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*, pp. 4-6.

<sup>109</sup> *Ibid.*, pp. 7-10.

diseases (with an expectation of suitable precautionary measures for washing down vehicles), to a requirement that the *Land Protection (Pest and Stock Route Management) Act 2002* (Qld) be adhered to.<sup>110</sup> Having surveyed the Code and Guide, some thoughts as to the Guide's possible relevance to the new regime follow.

### Scope of relevance

The shift in expectations for landholder/miner interactions mentioned above in the Guide and Code are indicative of a more general discourse of responsibility in the history of Queensland land use policy. Katherine Witt has divided this discourse into a series of epochs, namely: Epoch 1: pre-1957, 'socialist' Queensland, Epoch 2: 1957-89, Queensland 'countrymindedness', Epoch 3: 1989 to present, Queensland 'reformed'.<sup>111</sup> She suggests that a fourth epoch is underway as a result of 'new values in coal seam gas in rural Queensland'.<sup>112</sup> The Code and its supporting regulatory framework may therefore be an indication of this. While the introduction of statutes is often a reactive process to changing societal values,<sup>113</sup> it is equally important to note that legal frameworks are also bound to 'enduring power relations and precedents' – which 'often ensure that longstanding understandings of human relations with the natural world persist'.<sup>114</sup>

Katherine Witt contends that within the history of Queensland's political discourse 'the rights of land ownership have remained peculiarly unresolved in the perceptions of rural landholders' – citing the expansion of coal seam gas extraction on agricultural land as an example of the reappearance of a property rights discourse.<sup>115</sup> That statutory provisions governing land access are often reactive instruments rather than proactive should not surprise, as observed by Tina Hunter in 2011: 'At present the Western Australia government has not developed a statewide access policy framework or legislative provisions regarding land access [for shale gas extraction]. This is not unusual, given that Queensland only developed the policy framework and Access Code in 2010, many years after commercial CSG production commenced in that State'.<sup>116</sup>

At a general, contextual level, the Guide offers an example of a period in which constructive dialogue between miners and farmers was not only feasible, but capable of yielding mutually agreeable outcomes. Remembering historical instances of accommodation can be difficult in the light of current controversies, but deserve to be recognised and perhaps reflected upon as a means of tempering heated disagreement. This is also consistent with Dovers' third category of

<sup>110</sup> *Ibid.*, p. 9.

<sup>111</sup> Katherine Witt, 'Understanding responsibility in land ownership and natural resource management', PhD thesis, University of Queensland, 2012, pp. 42-49.

<sup>112</sup> Witt, 'Understanding responsibility', p. 42.

<sup>113</sup> Robyn Bartel, Nicole Graham, Sue Jackson, Jason Prior, Daniel Robinson, Meg Sherval and Stewart Williams, 'Legal geography: an Australian perspective', *Geographical Research*, vol. 51, no. 4, 2013, p. 346.

<sup>114</sup> Eric Pawson and Stephen Dovers, 'Environmental history and the challenges of interdisciplinarity: an antipodean perspective', *Environment and History*, vol. 9, no. 1, 2003, p. 66.

<sup>115</sup> Witt, 'Understanding responsibility', p. 279.

<sup>116</sup> Tina Hunter, 'Shale gas resources in Western Australia: an assessment of the legal framework for the extraction of onshore gas', *eLaw Journal: Murdoch University Electronic Law Journal*, vol. 18, no. 2, 2011, pp. 44-45, <https://elaw.murdoch.edu.au/index.php/elawmurdoch/article/viewFile/99/50> accessed 2 May 2014.



relevance. In a similar vein, many of the problems encountered by an embryonic coal seam gas industry in Queensland in the late 1970s – particularly those relating to water extraction – have continued in the present, with Luke Keogh arguing that ‘owning up to this history would place policy makers and regulators in a position to strengthen current regulation’.<sup>117</sup> With ‘fracking’ for coal seam gas in Queensland and New South Wales currently presenting much controversy, there is potential for an historical perspective to be useful to all parties in arguments around the industry’s social licence to operate.

There is also an argument that coal seam gas is ‘no different to any other productive land use within a landscape’<sup>118</sup> – with both threats and opportunities on offer. Multiple, competing requirements are ultimately a reality confronted by other sectors beyond mining and the experiences of other contentious land uses may offer a map of sorts to improved relationships between stakeholders. Some of the findings from a recent study of plantation forestry and social acceptance in Western Australia and Tasmania could serve as markers in a coal seam gas context – particularly given the latter’s export focus, physical presence in landscapes, capacity to generate local employment opportunities in rural areas and the longevity of the industry:

Plantations were considered more acceptable when planted on only part of a property rather than a whole property. Plantations were considered more acceptable in areas with local processing facilities than in areas where wood-chips are exported elsewhere. Plantations were considered more acceptable in areas with a few plantations than in areas with many or no plantations.<sup>119</sup>

The potential relevance of the Guide to the Land Access Code might be found in other ways, such as the Code’s statutory endorsement. While this can be seen as beneficial for all involved, as noted above, the lack of enforceable guidelines for part 2 of the Code has frustrated some landholders, who perceive this aspect of the Code to be insufficient – arguing that it should ‘be given a higher profile in a legislative sense’ to force compliance.<sup>120</sup> General complaints about the Code might be resolved through better training for industry in terms of their obligations when accessing a property.<sup>121</sup> Other problems raised with part 2 of the Code relate to pest and weed management provisions, which could be ‘better explained’ and ‘cover off on species that are not declared pest and weed species but are locally significant’.<sup>122</sup>

Despite concerns from those consulted in the rural sector, these perspectives were not included in any formal recommendations from the Queensland Land Access Review Panel, nor

<sup>117</sup> Luke Keogh, ‘The first four wells: unconventional gas in Australia’, *M/C Journal: A Journal of Media and Culture*, vol. 16, no. 2, 2013, np, <http://journal.media-culture.org.au/index.php/mcjournal/article/viewArticle/617>, accessed 2 May 2014.

<sup>118</sup> John Williams, Tim Stubbs and Ann Milligan, *An analysis of coal seam gas production and natural resource management in Australia: a report prepared for the Australian Council of Environmental Deans and Directors*, John Williams Scientific Services Pty Ltd, Canberra, October 2012, p. 100, [http://aie.org.au/AIE/Documents/Oil\\_Gas\\_121114.pdf](http://aie.org.au/AIE/Documents/Oil_Gas_121114.pdf), accessed 10 August 2014.

<sup>119</sup> Williams, ‘Public acceptance’, p. 351.

<sup>120</sup> Queensland Land Access Review Panel, *Land Access Framework*, p. 41.

<sup>121</sup> *Ibid.*, pp. 16-17.

<sup>122</sup> *Ibid.*, p. 42.

were they discussed in the government's response to the Panel's report.<sup>123</sup> Should landholders continue to advocate for changes to part 2 of the Code in proposed future reviews of the Queensland Land Access Framework,<sup>124</sup> it could be useful to point out the voluntary predecessors of the Code, including the Guide. Doing so would highlight the fact that an entirely voluntary document has had at least some level of historical success in creating an environment of improved relationships between farmers and miners, without the advantage of statutory force. This could assist in demonstrating that legally enforceable guidelines may not be necessary and that other means of securing compliance with the Code may be more appropriate.

### Conclusion

From the above case study of cooperation between the Queensland Grain Growers Association and Queensland Chamber of Mines in 1981-82, it has been shown that their jointly-published Guide emerged out of dissatisfaction with the statutory framework for the exploration of minerals in landscapes of primary industry. Despite initial reluctance, it was recognised that accommodation of the two sectors was desirable and that appropriate mechanisms could be introduced between the two bodies in the absence of government authority. The Guide was released and used as an example for other jurisdictions to follow. It has also been argued that this historical instance of accommodation between the two sectors is relevant to the current Queensland Land Access Code and Dovers' typology for environmental history, as both a contextual example (indicating that balancing competing land uses is not new) and an historical baseline – which may be relevant in demonstrating how stakeholders react to voluntary frameworks, as opposed to those largely enforced by statute.

The attempt of the Code to create a sense of shared responsibility between farmers and miners is a step forward from the Guide's emphasis on mining exploration companies interacting appropriately with landholders. Yet, given that voluntary goodwill is still a crucial part of managing that relationship, it might be argued that the experience of the Guide also links to Dovers' third category of relevance for environmental history in terms of a direct policy lesson – by offering a means of reframing current stakeholder perceptions of the Code and possible changes to it in the future. It is also clear that environmental damage was ongoing after the introduction of the Guide, and that it remains a serious issue in spite of the guidance provided by the Land Access Code. These experiments with accommodation between farmers and miners can be expected to continue, ideally with more evaluation into how social, economic and environmental harms from competing land use requirements can be reduced. With coal and coal seam gas development in Queensland currently driving the expansion of port infrastructure at Abbot Point (near Bowen) and Gladstone – with additional implications for the Great Barrier Reef

<sup>123</sup> Queensland Government, *Queensland Government Response to the Report of the Land Access Review Panel*, Department of Natural Resources and Mines, Brisbane, December 2012, pp. 1-19, <http://mines.industry.qld.gov.au/assets/native-title-pdf/qg-response-land-access-framework.pdf>, accessed 12 August 2014.

<sup>124</sup> Queensland Government, *Queensland Government Response*, p. 18.

and World Heritage management in the context of climate change – these industries have drawn in a range of stakeholders that extends well beyond farmers and conservationists anxious about land access. Therefore, further research is to be encouraged to determine if other historical precedents can inform contemporary practices.

### **Acknowledgements**

I wish to thank Professor Stephen Dovers, Professor Eric Pawson and Sonya Duus for critiquing an earlier draft of this manuscript. I am grateful to Fiona Simms-Farn of the Queensland Department of Agriculture, Fisheries and Forestry for granting permission to view material in the Queensland State Archives ahead of the normal access period. This research was supported by an Australian Postgraduate Award and a Supplementary Scholarship from the Fenner School of Environment and Society, ANU.

## Chapter 4: Unconventional Gas in Australia: Towards a Legal Geography

This chapter was published as David J. Turton, 2015, 'Unconventional Gas in Australia: Towards a Legal Geography', *Geographical Research*, 53(1): 53-67, DOI: 10.1111/1745-5871.12101. See Appendix 2 for published version.

### Abstract

Recent commentary on future research directions for legal geography highlights the need for studies that are historically grounded and focused on human– environment interactions in rural settings. As a current, controversial land use in Australia, unconventional gas (UG) development provides an ideal lens through which researchers can investigate these themes. Utilising emerging international literature and current Australian examples, this paper surveys major trends in the Australian literature relating to UG, before exploring some of the ways in which Australian legal geographers might contribute constructively to community debates around this resource. Seeking to encourage further analysis, this paper contributes to this developing literature by focusing on two key areas: the various legal actors involved in UG development in Australia (including their regulatory choices, spatial interpretations, expertise, and influence) and the implications for legal geography where attempts are made to establish 'social licence' through contractual arrangements between industry and individual landholders. This article also delves into the place of Indigenous Australians in relation to UG extraction and the questions this resource raises about land use conflicts in Australia more generally – offering suggestions for comparative international studies and further critique at the domestic level.

### Introduction

Legal geography is an increasingly dynamic research area, 'less a "field", than braided lines of inquiry that have emerged out of the confluence of various intellectual interests' since the 1980s (Braverman *et al.*, 2014, 1). Arguably not finding its voice as a disciplinary endeavour until 1994, with the publication of Nicholas Blomley's seminal *Law, Space and the Geographies of Power* (Delaney, 2014), Blomley called for studies that evaluate 'the manner in which legal practice serves to produce space yet, in turn, is shaped by a sociospatial context' (1994, 51). In a recent survey of Australian perspectives on the subject, Bartel *et al.* (2013, 349) concluded that legal geography's 'greatest impact is where its focus reveals the importance of scale, time and connection in specific local contexts' and that by 'situating law in space, that is within its physical conditions and limits, legal geography encourages place-based knowledge to form law's basis'. By making this claim, Bartel *et al.* (2013) extend legal geography's ambitions from that of a sociological critique of the law (e.g., Delaney *et al.*, 2001), to advocate for a reconfigured 'relation between society and the natural world itself' (Graham, 2011, 16).

With scholarly interest in unconventional gas (UG) growing across the physical and social sciences (Lave and Lutz, 2014), an attempt is made to selectively assess the extant Australian literature on this contested land use from a legal geography perspective, identifying ways in which this discipline might contribute to the public debate surrounding this resource. Sources of methane, ‘unconventional natural gas’ comprises three types: shale gas (SG), coal seam gas (CSG) (also known as coal-bed methane and linked with underground coal seams), and tight gas. All three forms are present within Australia, although their accessibility and commercial readiness vary, with shale and tight gas located within rock formations that pose extraction difficulties (Williams *et al.*, 2012; Measham and Fleming, 2014). Arguing that legal geography offers many insights into UG development in Australia and drawing on possible international comparisons, the following topics are considered: Conduct and Compensation Agreements in Queensland, litigation mechanisms, the multi-faceted place of lawyers and judges, legal precedent as a protest strategy for anti-CSG activism, the role of local government in approving protest camps, and finally questions of compensation. Legal geography might also be a fruitful lens for studying other contentious land uses. In setting out their aims for *The Expanding Spaces of Law: A Timely Legal Geography*, Braverman *et al.* (2014) contend that silences and gaps abound within the literature of this field. Two are particularly pertinent for this review: the tendency for legal geography writings to exclude the rural from their investigations and to avoid historically grounded analysis in favour of exploring the connections between contemporary urban spaces and the law. This urban focus does of course have merit in a UG context, such as explaining setback distance ordinances for SG drilling in urban counties of Texas (Fry, 2013). However, as much of Australia’s UG expansion is occurring in rural localities, a focus on this aspect of the sector’s legal geography would be beneficial for researchers.

Summing up the efforts of legal geography for their own critique of SG regulation in Pennsylvania, Andrews and McCarthy argue that researchers have ‘paid far too little attention to the environment as both an object of governance and a terrain of struggle with respect to the law’ (2014, 7). Although their absence has been noted in the wider legal geography literature (Delaney, 2001), issues relating to the environment and the place of the law within it have intrigued Australian historical geographers (e.g., Stratford, 1993; Stubbs, 2001; Holmes, 2014). More recently, a legal geography slant has proved attractive to those investigating siting disputes through an environmental justice lens (e.g., Jessup, 2013). Other socio-legal arenas may assist in informing that research direction in the future (e.g., analysis of the Commonwealth’s 2007 Northern Territory Emergency Response, see Keenan [2013] and Crabtree [2013]).

This paper seeks to contribute to this growing research effort, reviewing some of the ways in which legal geography may aid in developing a richer understanding of the UG sector in Australia. This includes the manner in which this industry is disputed by pressure groups on a national scale, focusing on two areas in the emerging literature. The first is through studying the types of legal actors involved, their choices, geographical interpretations, and the influence of

their expertise upon regulatory decisions. The second area for focus are the attempts made by companies to achieve a community ‘social licence’ via contractual agreements with individual landholders, considering also protest strategies employed by social movements to counter such efforts. Other issues are noted, including lobbying efforts to alter the physical extent of regulatory measures for UG and the emerging role of Indigenous people in the development of this industry. Drawing on recent international commentary and using current examples to demonstrate the applicability of this analysis in an Australian context, this paper argues that the opportunities and risks posed by UG development provide an ideal setting for researchers to test various themes in the legal geography literature in greater depth.

### **Law, geography, and unconventional gas**

Mining and UG extraction has engaged the interest of legal geography scholars for some years, with research in the United States examining the historical interconnection between mining law and geography (Matthews, 1997), the present-day competition between mining and Indigenous cultural heritage legislation (Benson, 2012), the power of property law as a source of social disorder in the Appalachian coalfields (Haas, 2008a; 2008b), and the politics of a particular statute and the constitution of expert committees reaching planning decisions (Hudgins and Poole, 2014; Simonelli, 2014). Andrews and McCarthy (2014) recently combined the analytical tools of legal geography and political ecology to investigate Pennsylvania’s Act 13 and its role in facilitating mineral extraction from the Marcellus Shale in the United States by preventing local government control over zoning arrangements for natural gas, noting that law is a powerful instrument of State authority, with significant capacity to shape the social and legal spaces that extractive industries operate in. Australia has yet to be served by similar studies. Much of the popular literature devoted to both coal and UG development in Australia is focused on the individual experiences of landholders, with a particular emphasis on the efforts of various communities to negotiate (successfully or otherwise) with governments and private corporations (e.g., Cleary, 2012; Manning, 2012; Munro, 2012; Pearse *et al.*, 2013). Although the stories revealed are often compilations of news reports and all too frequently utilised for explanatory power rather than critical analysis, there are still numerous glimpses into issues that are a legal geographer’s stock and trade: the interconnections between space, society, and power.

The above popular accounts are regularly cited within the Australian academic literature (e.g., Sherval and Hardiman, 2014). Similarly to the work of popular authors, academic commentators frequently utilise the near-constant media outpourings surrounding both coal and UG extraction in Australia (e.g., Galloway, 2012; McManus and Connor, 2013). However, the intended audience of a specialist journal may obviously be quite distinct from a journalist’s readership. As an example, the anti-CSG organisation Lock the Gate has figured prominently in much of the Australian literature, yet their organisational materials are only gradually becoming the subject of critical discourse analysis, highlighting the extent to which this social movement distinguishes itself from not only CSG companies, but also the ‘growth first’ message of the

Queensland Government (Mercer *et al.*, 2014). Australian commentators have also shown an interest in gauging community perceptions of natural resource extraction and their capacity to influence social identity (e.g., the linking of concerns about land rights with cultural understandings of the landscape, see Lloyd *et al.*, 2013). Others have sought to critique the legal infrastructure of both SG and CSG in Australia, with some international comparisons being made (e.g., Hunter, 2011; 2014; Swayne, 2012).

One means of expanding the range of legal geographies displayed in UG disputes is to explore how other disciplines have interpreted the social impact of mineral extraction, such as the prevention of criminal activity in mining camps, currently a key focus for criminologists (e.g., Carrington *et al.*, 2011). Although not without data collection obstacles, the distribution of assault offences, or the dynamics of private security contractors acting in a policing function are questions for legal geographers to consider. Doing so may contribute to broader Australian and US studies concerning the clout (or otherwise) of physically distant law enforcement agencies in rural settings (Millner, 2011; Pruitt, 2014). Distance between land uses is clearly an important part of the UG literature (e.g., Fry, 2013), but the concept of scale is also particularly relevant as a gauge of social licence for extractive industries at local and regional levels. In Australia, Lacey and Lamont (2014) have pondered the spatial nature of over 4000 Landholder Access Agreements between landholders and CSG operators in Queensland (*Petroleum (Production and Safety) Act 2004* (Qld), ss 533–534), questioning whether or not these contractual arrangements – which are functionally akin to an easement (Christensen *et al.*, 2012) – are truly reflective of a broader social licence to operate. Even where an Agreement is successfully negotiated, community doubts may linger, because these documents are more akin to one-off business deals than a broader social contract (Manning, 2012; Lacey and Lamont, 2014). In addition to negotiation dynamics (Liss, 2011), these agreements with CSG operators expose social and cultural issues in community relationships with CSG operators. The extent to which these are resolved in legally binding contracts is only beginning to be explored by researchers (Trigger *et al.*, 2014), presenting a knowledge vacuum in the literature for legal geographers.

Judicial interpretations of time and geography may also be relevant in discussions between landholders and CSG companies: particularly where it serves as grounds for judicial review of government decision making. In 2011, QCLNG Pipeline Pty Ltd was engaged in negotiations with the landholder Michael Baker to install a CSG pipeline across a portion of his property at Eidsvold in the North Burnett region of Queensland. This was part of QCLNG's larger endeavour to construct a CSG pipeline from the Surat Basin to the industrial port of Gladstone in central Queensland. QCLNG's failure to provide Baker with an appropriately scaled map of the property that would be used for the pipeline was found to be a denial of procedural fairness. Procedural fairness is a fundamental concept of administrative law and revolves around the idea that a person who might be adversely affected by an administrative decision must be given a fair hearing before a decision is made. In this case, procedural fairness referred to Baker being given sufficient

information by QCLNG to be able to participate meaningfully in the decision-making process and also being permitted a reasonable opportunity to respond to QCLNG's pipeline application before a decision was made by the Queensland Department of Natural Resources and Mines. Because Baker lacked a sufficiently precise map of QCLNG's pipeline route through his property and was not given accurate information in sufficient time to respond to QCLNG's application to the Department, Justice Dalton concluded Baker did not receive procedural fairness, ruling that the Department's decision to grant QCLNG access in that particular location was void (*Baker v Minister for Employment, Skills and Mining & Another*, 2012). In this instance, judicial understandings of time and space converged with legal consequences for the parties. Although only one judgement, it demonstrates that litigation case studies are an important way for UG researchers to analyse both the temporal and spatial elements of this industry, by investigating legal interpretations of geographical concepts, such as scale (Valverde, 2014). This approach could widen the current focus of the Australian UG literature beyond case notes aimed at legal professionals (e.g., Geritz *et al.*, 2012) and reach an audience critiquing other aspects of the sector (including public participation and information-sharing).

As shown above, the manner in which land use agreements are enacted by stakeholders or contested between them is a subject of ongoing deliberation. Recent judicial findings from the Queensland Court of Appeal sought to clarify the types of remedies available to landholders who are not able to successfully negotiate a Conduct and Compensation Agreement with CSG companies. In *Australia Pacific LNG Pty Ltd v Golden* (2013), Justice Muir ruled that accessing alternative dispute resolution remedies to secure a Conduct and Compensation Agreement, in this case through arbitration, was not possible without both parties consenting to use this form of negotiation (Hough, 2014; Plumb and Shute, 2014). As legal spaces are founded upon 'contested social practices and material realities', litigation has a crucial role to play in the process of maintaining and reworking of space (Jepson, 2012, 616). Landscapes are in many ways legal performances, with law acting as a fusing agent between place and identity (Howe, 2008). Litigation is an integral component of this performance, and further research is warranted given the extent of these agreements with landholders.

Benson (2014) builds on this idea by suggesting that the internal 'rules of engagement' surrounding formal litigation (e.g., standing) are in themselves another facet of 'everyday' legal geography, veiled though they may be in procedural 'neutrality'. There are certainly many ways in which standing can be analysed in Australia, particularly given its range of applications in recent decades (Douglas, 2006). As an important filtering mechanism in the litigation process, standing is a rule that may involve 'sacrificing the rule of law, and the protection of individual and corporate interests at the expense of collective interests' (Douglas, 2006, 22). An absence of standing could also limit community objections to SG development in Tasmania (Ryan, 2014). Given this tension, analysis of standing rules from a geographical standpoint could assist in discerning the possibilities of a distinctly 'Australian legal geography' (Bartel *et al.*, 2013).



Accepting that the ‘everyday’ aspects of litigation are an underutilised component of the legal geography literature (Benson, 2014, 218), these ‘rules of engagement’ can be seen through the prism of UG disputes in Australia. For example, the New South Wales Office of Coal Seam Gas recently decided to suspend their approval for the company Metgasco to drill an exploration well at Bentley near Casino in the Northern Rivers region of the state, ‘on the basis that the company was not in compliance with its community consultation obligations’ (New South Wales Office of Coal Seam Gas, 2014). Metgasco has responded in turn by seeking judicial review of the suspension (Metgasco, 2014a; 2014b), therefore there may be an opportunity to combine the growing literature around the importance of community engagement in CSG developments with legal analysis of conditions attached to an exploration licence (ABC News, 2014d).

Another example could be an examination of the rule of evidence known as ‘discovery’. Although a seemingly benign mechanism for ensuring that all parties exchange relevant documentation prior to the closing of litigation proceedings, when the rule’s adversarial context is acknowledged, it may also assume contested meanings. The instrument of discovery may be both a step towards answering questions of possible contamination of water bores near the Pilliga State Forest in the public interest for the people of New South Wales (the view of the NSW Environmental Defenders Office), or serve, according to the company Santos, as an irrelevant data-gathering exercise for potential litigation in the future (EDO NSW, 2014; Herbert, 2014a). Differing interpretations are of course at the heart of the law’s operation, with lawyers serving as both translators and creators of legal language and everyday discourse (Sugarman, 1994).

Beyond land access concerns, the impact of CSG operations on the real estate market in New South Wales has attracted media (ABC News, 2014a) and academic commentary (Fibbens *et al.*, 2013; 2014). Speaking on the Hunter Valley real estate market recently, the State Valuer General, Phillip Weston, stressed the challenges of determining the causes behind property sale delays, on account of both coal and CSG development in the region. Weston acknowledged that the immature nature of the CSG industry in NSW also made this type of research difficult but confirmed that: ‘There seems to be some anecdotal evidence from property professionals there has been some changes in terms of the length of time it’s taking for properties to sell’ (ABC News, 2014a). For Fibbens *et al.* (2013; 2014), there remain ongoing questions surrounding the compensation regime of the *Petroleum (Onshore) Act 1991* (NSW) as raised by CSG extraction. The occupation of land by CSG operators is not equated with acquisition of freehold title, but a company’s operations require access arrangements between themselves and landholders that ‘tie up land for the term of occupation’, an inherently uncertain length of time, ranging from 20 to 40 years on some estimates and subject to the economic viability of the resource itself (Fibbens *et al.*, 2013, 5).

Drawing on compensation and valuation theory, Fibbens *et al.* (2013) argue that the New South Wales legislative framework for mining operates on a preconceived notion that all exploration activities are temporary (*Petroleum (Onshore) Act 1991* (NSW), s 107), thereby

affecting the manner in which compensation is considered. They find the legislation wanting on several grounds, including loss of business goodwill and special value (land having value to an owner due to some ‘attribute or use made of the land’) (Fibbens *et al.*, 2013, 7, 11–12). Given media coverage of CSG exploration and its possible influence on tourism numbers (Schweinsberg and Wearing, 2013), could negative publicity prompt a law reform argument for loss of business goodwill (Fibbens *et al.*, 2014)? Other openings for discussion are raised around the impacts of access agreements and CSG infrastructure, with potential for qualitative and quantitative studies into the affects of CSG development on property values (Fibbens *et al.*, 2013).

Internationally, SG development presents its own series of ‘what if?’ scenarios for US valuers (Lipscomb *et al.*, 2012). Despite cross fertilisation potential, Kedar (2014) has described the dearth of comparative research outputs from legal geographers as a significant challenge for the field. Attempts at a comparative approach are clearly not without difficulties. For example, a US study of landowner coalitions seeking to collectively bargain with natural gas companies to draw up legally binding leases seems unlikely to find an Australian equivalent (Jacquet and Stedman, 2011), because mineral subsurface rights in the United States, unlike the situation in Australia, are primarily held by private landholders. The global distribution of legal geography researchers presents another challenge, with scholarly efforts largely confined to precedent-focused common law countries – leading to a methodology bias against code-based civil law traditions (Villanueva, 2013, 36; Kedar, 2014). However, the use of moratoria by state governments in both the United States and Australia to prevent and postpone UG development is one fruitful comparative pathway, with only limited critique of moratoria in New York State (Simonelli, 2014) and mixed media coverage in Australia (e.g., King *et al.*, 2013; McGauran, 2013; Carter, 2014). Any comparative research would need to acknowledge differing political contexts, with some countries more wary of UG development than others (Becker and Werner, 2014). Comparing Australian and Indonesian legislative responses to a growing UG industry is another possibility (for an Indonesian perspective, see Godfrey *et al.*, 2010). It is also worth pointing out that geographers have already shown some of the potential rewards for posing comparative questions, for example, through the relevance of competing cartographic interpretations for offshore oil and gas negotiations between Australia and East Timor (Nevins, 2004). Aside from international comparisons, additional insights into the Australian legal geography of UG would be gained from key professionals, such as town planners and legal practitioners.

### **Legal practitioner perspectives**

Socio-legal researchers have long recognised that lawyers occupy a privileged, multifaceted position in society, as both officers of the legal system and an all-important link between the courts and the wider population (Ingleby and Johnstone, 1995). Their capacity to engage across these arenas can be seen in the realms of policy reform, legislative drafting, and litigation advocacy – often with blurred distinctions (Tomasic, 1978). Geographers have recognised that

law is ‘too important to be left to the lawyers’ (Friedman, 1986, 780), but researchers have remained reluctant to engage systematically with the profession. Nonetheless, legal professionals exert considerable influence as ‘constituents of landscape’ (Martin and Scherr, 2005, 379). In wider socio-legal research, members of the legal profession have offered their voices to substantiate research questions in the past. Occasionally this has taken on a geographical component, as seen in Smith’s (2006) study of Australian criminal defence lawyers and their motivations for representing the unpopular. Others have considered the impact of geography as a factor in the transplantation of legal precedent among Australia’s state courts (Smyth and Mishra, 2011). These studies could well be considered cases of legal geography in all but name, as many authors would not see themselves as legal or geography practitioners (Blomley, 2003a).

Although the perspectives of legal practitioners can be seen in a variety of sources relating to UG in Australia, from interviews with the media (Locke, 2014), Parliamentary inquiries (De Rijke, 2013a), legal determinations (Plumb and Shute, 2014) and professional journals (Christie, 2012), as a group, legal practitioners are not generally seen as influential actors in directing the outcome of land-use disputes. This is despite their often central place in attempting to resolve contested legal and political claims (Martin *et al.*, 2010). They can do this by deploying arguments and language against judges in order to persuade and create physical effects upon the world (Delaney, 2010).

Despite this recognition, Deborah Martin *et al.* have correctly identified that both lawyers and ‘the practice of the law’ are generally missing from the growing output of the legal geography project (Martin *et al.*, 2010, 176). Viewing lawyers and judges as ‘nomospheric technicians’ (Delaney, 2010, 158, 159) is one means of analysing legal professionals and their litigation/adjudication strategies through a legal geography framework. The ‘nomosphere’ is derived from *nomos*, Greek for law, and refers to ‘the cultural– material environs that are constituted by the reciprocal materialization of “the legal”, and the legal signification of the “socio-spatial” ’ (Delaney, 2010, 25). ‘Nomospheric technicians’ are actors within the nomosphere, namely lawyers and judges, who advance their goals by various tactical means (Delaney, 2010; Benson, 2014). This term is an element of Delaney’s wider nomospheric investigations research and a response to Nicholas Blomley’s earlier call for researchers to create a conceptual language ‘that allows us to think beyond binary categories such as “space” and “law” ’ (Blomley, 2003b, 29–30). For Delaney, the ‘nomosphere’ amounts to ‘the cultural-material environs that are constituted by reciprocal materialization of “the legal” and the legal signification of the “socio-spatial”, and the practical, performative engagements through which such constitutive moments happen and unfold’ (2010, 25). Applying his concept to legal professionals, or ‘technicians’ of the nomosphere, Delaney links the actions of these key actors with changes in geographical space:

[W]hat nomospheric technicians do can be thought of as a kind of fabrication process, where raw materials are brought together and worked on, and which results in the construction of nomospheric world-models. These...representations are fabricated in order to be presented in ritual,

institutional settings to other nomospheric technicians (judges). The job of judging essentially entails the assessment of the relative merits of contending world-models according to a range of criteria. Judges disqualify one, and validate another... These arguments as world-models are not offered [by lawyers] for the purposes of contemplation or admiration. They are designed to have cognitive and affective effects on judges and practical effects in the world. They are pragmatically fabricated in order to persuade—to cause an empowered state actor to see the world in a particular way [and act accordingly]. (2010, 159–160. Emphasis in original.)

As a new development in the literature, it may be some time before the potential of legal practitioners as a research source is fully realised. Although acknowledging that Martin's challenge should be responded to, possibly through the lens of Delaney's world-making nomosphere, there is even greater scope to include individuals from all levels of legal practice in this analysis, not just lawyers: from law students to judges, legal academics, in-house company counsel, and bureaucrats. This is illustrated by the public unease associated with CSG development and competing community narratives of place in rural centres (e.g., Sherval and Hardiman, 2014). As noted above, the perspectives of individuals involved in the legal process are to be found in many places, from media coverage of self-represented litigants recalling their experiences in the Queensland Land Court (Calderwood, 2014), popular texts on coal development in Australia (Manning, 2012, 10; Munro, 2012), industry journals containing commentary on the latest regulatory developments (Plumb, 2013; Brockett, 2014; Hoare et al., 2014), speeches, policy submissions, and scholarly articles by judges and barristers (e.g., Christie, 2012). Then there are the more obvious contributions of legal judgments and draft legislation. Geographers and legal commentators have themselves utilised the power of interviews for their own research, enriching their analysis beyond purely regulatory matters in the process (Sherval and Graham, 2013). Keeping an open mind as to the all-encompassing impact of legal relations is beneficial to the researcher, as clearly lawyers are not the only professional group responding to the challenges of UG, with many other active participants, such as town planners, bureaucrats, land valuation experts, and police.

Beyond individual actors, legal structures are bound more generally to community understandings of a nation's cultural heritage. Australia's legal history and the contemporary conditions of Indigenous Australians are not necessarily new ground for legal geographers (Bartel *et al.*, 2013), but integrating these issues into the broader context of extractive industries in Australia is another potential area for researchers to explore.

### **Legal history and contemporary Indigenous perspectives**

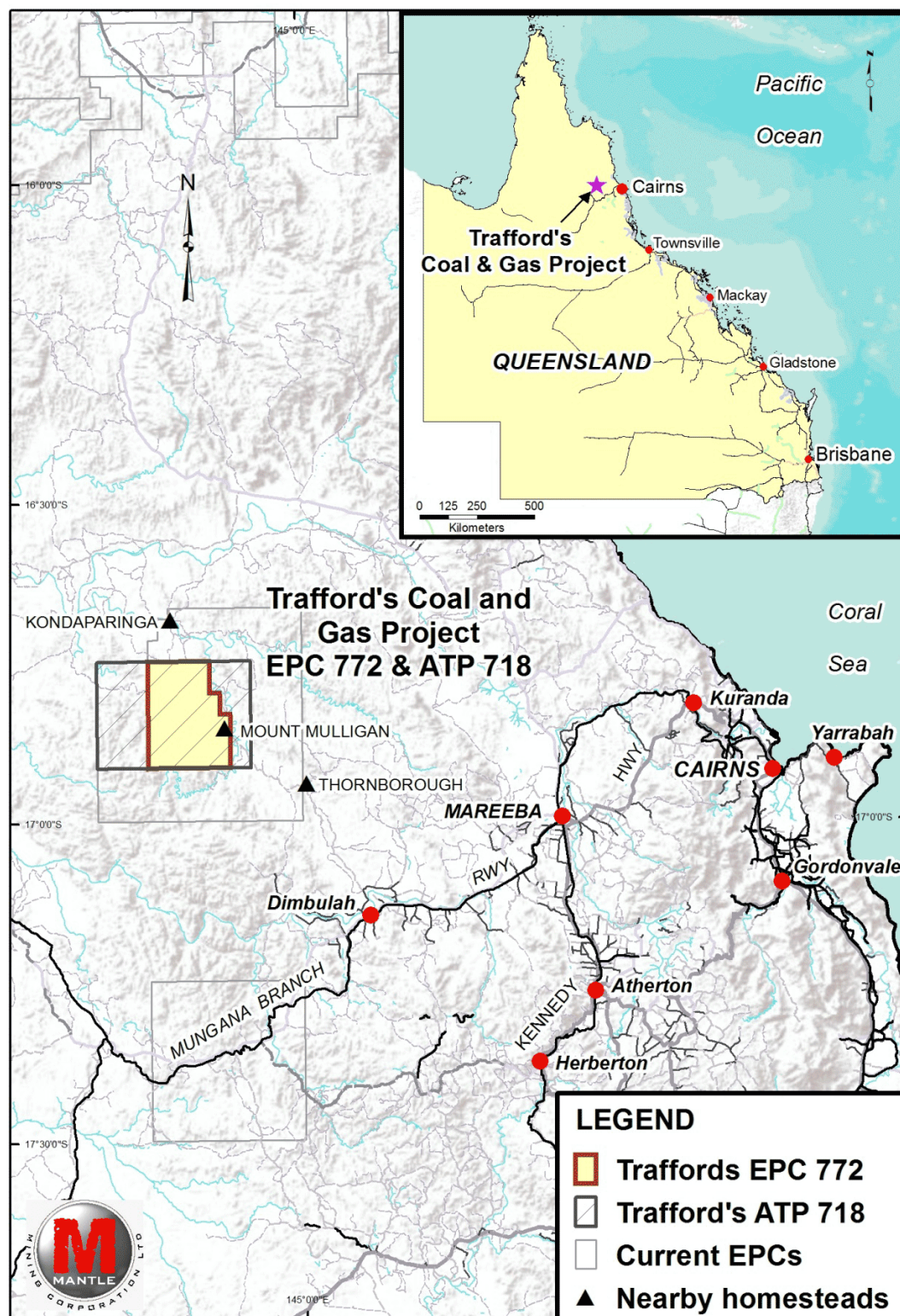
Political campaigns surrounding contested land uses are not a new phenomenon in Australia. As the latest resource to court controversy, the exploitation of UG offers historically minded legal geographers the opportunity to reflect more critically upon competition between private property interests. Although CSG development in particular has been credited with altering previously held

community beliefs about State ownership of mineral resources (Organ, 2014), this ‘modern property law conundrum’ (Weir and Hunter, 2012) has an historical twist:

Ironically, the exercise by miners of CSG rights is in direct contrast to the mining industry’s widely publicised untruthful objections to native title following the Mabo and Wik decisions [in 1992 and 1996 respectively]. Aggressive national campaigns were run at the time, warning freehold landowners of the threat that native title posed to the maintenance and exercise of private property rights. Native title, that most fragile of all property rights, was never contemplated as being in competition with freehold title in spite of the miners’ claims. In contrast, CSG rights directly and explicitly collide with what [Blackstone called] ‘the highest and most extensive interest that a man [sic] can have’ in land. (Galloway, 2012, 79)

Indigenous Australians have certainly featured strongly in critiques of the mining industry (e.g., Cleary, 2012; Pearse *et al.*, 2013). They may also have a significant role to play in discussions around UG in Australia, depending on drilling locations. A future example of this may potentially be seen at Mount Mulligan (Nguddaboolgan), 100 kilometres west of Cairns (Figure 1). An impressive natural landmark of sandstone cliffs, coal deposits beneath the mountain supported a mining community from 1914 to 1958. Entering a new phase as a cattle property (Bell, 1978), it now serves as an eco-tourism operation following a recent purchase at auction (North Queensland Lock the Gate Alliance Affiliate Group, email 13 October 2014). Mount Mulligan is also entrenched in North Queensland folklore as the scene of Queensland’s worst land disaster, a massive coal dust explosion on 19 September 1921 that resulted in the deaths of all 75 men and boys working underground (Bell, 1978; 1996; 2013). Significant for its Indigenous prehistory, archaeological evidence of human habitation in rock shelters of the mountain date to 37 000 years (Bell, 1996).

From 1991, Mount Mulligan was owned by the Western Yalangi Aboriginal Corporation and leased to the Queensland Department of Environment and Heritage as the Kuku Djungan Nurrabullgin National Park (Bell, 1996). In August 2012, the Djungan people were granted native title interests over the site by the Federal Court, permitting them exclusive use of approximately 149 915 hectares in and around the mountain (*Archer on Behalf of the Djungan People #1 v State of Queensland*, 2012; *Queensland Government*, 2012).



**Figure 1** Map of Trafford Project. Source: Mantle Mining Corporation (2014a, 7).

The area is once again generating interest due to a coal exploration licence being granted to Mantle Mining Corporation, a Perth-based company, in 2008. The area may also be the subject of future CSG exploration, with Mantle Mining's application presently under consideration with the State Government (Nancarrow, 2014). The company's initial 4-year coal exploration permit was recently extended by the State Government to 4 December 2015 and relates to a 5500 sq km area surrounding Mount Mulligan. Initially, an Indigenous Land Use Agreement was executed with the Djungan people, who formed a Coordinating Committee to work with Mantle Mining to progress exploration plans and manage Indigenous cultural heritage (Mantle Mining Corporation, 2012; 2014a; 2014b). This Committee had a leading role in finalising a Conduct and Compensation Agreement that was entered into by the Djungan people and Mantle Mining in November 2013 (Mantle Mining Corporation, 2013).

In a place alive with legends and cultural heritage – dealing with both the disaster (Bell, 1979–1980) and the origins of the mountain itself in Indigenous oral tradition – the extension of Mantle Mining's coal exploration licence and potential for CSG operations has caused some consternation. Traditional owners held a public meeting at Mareeba on 28 May 2014, to discuss the company's intended operation – expressing concern at the potential for contamination of underground aquifers and urging Mantle Mining to negotiate with them to secure an access agreement (Cluff, 2014; Reghenzani and Vlastic, 2014). With presentations from visiting residents of Chinchilla, solicitors from the North Queensland EDO, Federal and State politicians and key members of Lock the Gate, further discussion is planned (Nancarrow, 2014; North Queensland Lock the Gate Alliance Affiliate Group, email 9 June 2014). Whether this represents the type of contractual agreement versus social licence conundrum suggested above by Lacey and Lamont (2014) remains to be seen.

This brief overview hints at how sites such as Mount Mulligan present possibilities for researchers examining UG development in a local Australian context. As landscapes are partly influenced by community perceptions of the law, the manner in which the UG industry is implemented may vary between localities, notwithstanding the legislative intent of central government (Jones, 2006). Legal analysts concerned with access to justice challenges for rural and remote Australian communities have acknowledged the wider role of geography in determining both the choice and costs associated with obtaining legal counsel and environmental experts (e.g., Millner, 2011). However, this 'tyranny of distance' and resources remains an underexplored area from a UG standpoint. Researchers may choose to consider this further, with rural areas arguably distanced – both physically and socially – from the 'force of the state' as a source of legal order (Pruitt, 2014, 190). Consequently, negotiations across multiple scales and jurisdictions are commonplace.



### Scale and spillover

The spatial and categorical obsessions of both law and property have been recognised by legal geographers for some time (e.g., Dorsett and McVeigh, 2002; Blomley, 2005). Extractive industries are also notable for their ability to affect regions in a spatially uneven manner, with the law serving as an instrument in this process of social construction (Haas, 2008b). If the notion of jurisdiction is understood to be ‘law’s territory’ (Ford, 1999), then the use of legal authorities as a protest strategy against coal and CSG development by Lock the Gate, for example, presents another research question for legal geographers (Figure 2). Illustrating this most clearly, the High Court’s decision in *Plenty v Dillon* involved the failure of two police officers to provide a search warrant to Plenty before entering their premises.



**Figure 2** Invoking boundaries as a protest strategy. Source: Lock the Gate Alliance (2014).

The High Court’s finding of trespass against the police, in the absence of lawful authority to enter on to Plenty’s property, seems far removed from Lock the Gate’s efforts to halt mining operators who have been granted licences by the State (1991, 635). However, this has not prevented the symbolic use of the Court’s decision on signs by anti-CSG protestors; combining a physical barrier with a jurisdictional challenge. Social spaces and boundaries are of course ‘saturated’ in legal meanings and often subject to ‘divergent interpretations’ (Delaney *et al.*, 2001, xviii). The symbolic politics of property is a theme to be found across the world and is not limited to extractive industries (e.g., Blomley, 1998; Brower *et al.*, 2009). In addition to being a ubiquitous presence in the world (as Austin Sarat famously observed: ‘law is all over’, quoted in Delaney, 2003, 67), law is also a tool through which protest action can be mobilised for particular ends.



The extent of law's reach in society makes it an attractive weapon for protest groups, yet its deployment remains contingent upon geographical context (Akinwumi, 2012). Interpretation and prioritisation of different geographical scales can be relevant for framing community dissent and ultimately the legal basis for development approvals (Jessup, 2013). Jurisdictional choices by regulators can also be a source of dispute, as farmers in the Pilliga Forest region of New South Wales recently discovered, after the CSG operator Santos was fined \$1500 by the NSW Environmental Protection Agency for failing to prevent a uranium spill into a local aquifer – a leakage found by Santos itself and reported accordingly. Although the regulator also imposed a pollution reduction programme upon Santos, forcing the company to improve monitoring and remediation infrastructure at the site, for some observers this was not a sufficient penalty, leading to questions about its regulatory approach: '[F]armers and environmental groups say the EPA has failed its charter. They say if Santos had been forced to go before the Land and Environment Court, it could have been liable to penalties of up to a million dollars' (Cornwall, 2014).

It is stressed that the law's geographical impact can be shaped by any number of stakeholder perspectives, not just those who protest the existence of the UG industry. The spatial extent of the sector has been noted widely in the literature, both within Australia and overseas (e.g., Stedman *et al.*, 2012; Measham and Fleming, 2014). Less attention has been directed to stakeholder efforts to mould the State's regulatory response to this expansion. For example, alleged lobbying by the resource company Santos to modify the geographical range of a then draft New South Wales Strategic Regional Land Use Policy (released in 2012) suggests there is more to be said about how regulatory choices regarding the industry are made and what influences may underpin them (Lamacraft, 2014).

Landholders have demanded the legal right to refuse entry to CSG operators at a Parliamentary level (Galloway, 2012) but seem to have had more success with their argument when particular companies have declared that they will not seek to establish themselves where they are deemed unwanted (e.g., the land access agreement reached between Santos, AGL, the NSW Irrigators Council and Cotton Australia in March 2014: Herbert, 2014b, see also the subsequent discussions between Dairy Connect and AGL at Gloucester in New South Wales, ABC News, 2014c). These industry arrangements can of course be seen as an effort to construct a social licence to operate and avoid reputational damage to a company's image (Tuck, 2012), but the protest strategy itself has not (as yet) resulted in formal legal change by government. The spatial presence of protests against CSG development can also be found in the local government approvals for protest camps – as demonstrated by the non-renewal of a permit to expand a protest camp at Bentley, New South Wales. As explained by the Richmond Valley Council, existing uses of the landscape and public health concerns were key considerations: '[Their] application . . . has been opposed by people who have a fairly strong influence, such as the police...R[oads and] M[aritime] S[ervices] and our planners themselves . . . It unfortunately is not of an appropriate quality and the proposed use will not be approved' (ABC News, 2014b).

The above shows that in defining the boundaries and uses of landscapes, some specialist groups have considerable power. For example, despite the fact that local government in Australia is generally perceived to be excluded from decision-making processes around UG (De Rijke, 2013b), their role may be of increasing relevance given the use of referendum-style polling on CSG developments in local government areas (Luke *et al.*, 2014) and attempts by some councils to ‘lock the gate’ to CSG operators (Robertson, 2014). UG extraction raises jurisdictional questions that traverse far more than compensation, land access, and environmental harms – partly because of its relatively short commercial existence in Australia (Keogh, 2013). It therefore has the potential to create new legal frontiers.

### **Conclusion**

As shown above, there are many ways in which legal geography might contribute to the ongoing public debate in Australia around UG extraction. Researchers may choose to approach this challenge by studying the types of legal actors involved, their choices, spatial interpretations, arguments, and the influence of their expertise upon regulatory decisions. Alternatively, ongoing CSG development presents opportunities for companies attempting to achieve community social licence via contractual agreements with individual landholders, and for the use of boundaries as a protest strategy to counter such efforts. The physical extent of regulatory measures may also be influenced by lobbying from any number of interested parties, including Indigenous people. In the search for extractive models, further analysis of the comparative type undertaken by Hunter (2014) is warranted to assess whether Australia’s regulatory regimes are appropriate for the minimisation of social, economic, and environmental costs. This is no easy task where energy law and policy is concerned. With both ‘unique and universal truths’ surrounding issues of compensation, litigation processes, land valuation and Indigenous perspectives (Bartel *et al.*, 2013, 348), Australian commentators are encouraged to compare these questions while addressing their domestic circumstances. Perhaps most importantly, the controversy of UG extraction invites wider questions about resource use and the linkages between space, power, and society as a whole.

### **Acknowledgements**

This research was funded by an Australian Postgraduate Award and a Supplementary Scholarship from the Fenner School of Environment and Society, Australian National University. I wish to thank one of my PhD supervisors, Dr Tom Measham (CSIRO/ANU), for his helpful comments on an earlier draft of this manuscript.

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## Chapter 5: Lawyers in Australia's coal seam gas debate: a study of participation in recorded community forums

This chapter was published as David J. Turton, 2015, 'Lawyers in Australia's coal seam gas debate: a study of participation in recorded community forums', *The Extractive Industries and Society*, 2(4): 802-812. See Appendix 3 for published version.

### Abstract

Seeking to encourage greater scrutiny of lawyers in Australia's coal seam gas (CSG) debate, this paper analyses lawyer-community interaction at six recorded CSG community forums held between 2011 and 2014. Using the concept of a lawyer as a 'translator' of client concerns from the legal geography literature and viewing the identified forums as informal exchanges of legal knowledge, it is argued that lawyers informed audience members about land access laws relating to CSG, translated audience anxieties and questions about CSG into legal claims, and framed critiques of CSG laws around personal experiences of the legal process to call for law reform at these forums. Acknowledging the broader context in which these community forums were held, financial and political factors are considered as potentially relevant for driving the involvement of some lawyers in forum speaker panels, noting the apparent absence of CSG industry legal representatives from all recorded community forums. Potential future research avenues are also highlighted.

### 1. Introduction

In recent years, the coal seam gas (CSG) industry has been a prominent feature of media headlines and political debate in Australia (e.g. Manning, 2012), particularly in the eastern States of New South Wales and Queensland. Coal seam gas, also known as coal bed gas, is a source of methane found in underground coal seams (Williams et al., 2012). Support for its development is partly due to a need to reduce rising greenhouse gas emissions caused by the use of fossil fuels, such as oil and coal. As the largest sources of energy for humans globally, on some calculations it is claimed that coal and oil 'produce 1.4 to 1.75 times more greenhouse emissions than natural gas' on a lifecycle basis (Barnett, 2010: 1). Some observers therefore view CSG as a step towards a necessary transition to low and zero carbon-emitting energy sources (Barnett, 2010). The possibility of fugitive methane emissions from CSG production may diminish the potential greenhouse benefits of this resource, but currently incomplete information and inconsistent assessment measures complicate research findings on this question (Day et al., 2014; Vickas et al. 2015). These scientific investigations are of great significance, given the need for appropriate CSG regulation and the extent to which this might be challenged in the future through climate change litigation, as has occurred with other fossil fuels both internationally and domestically (Osofsky, 2011, 2013; Peel, 2007).

Critiques of CSG from across the physical and social sciences generally highlight its economic potential or argue that the industry should be extinguished on the basis of negative social and environmental impacts (Lave and Lutz, 2014). Others favour a cautious approach to the industry's expansion in view of potential cumulative risks to water aquifers and surface ecosystems as a result of CSG extraction processes and the placement of associated infrastructure, among other concerns (Randall, 2012; Tan et al., 2015). Despite academic interest in the activities of the anti-CSG social movement Lock the Gate, an alliance between environmentalists and farmers in Australia against coal and CSG development (Lloyd et al., 2013; Mercer et al., 2014; Kuch and Titus, 2014; Colvin et al., 2015), similar scholarly attention has not been extended to the nation's lawyers. A lack of targeted research into the involvement of lawyers in CSG issues may be the result of a researcher preference for speaking with parties directly affected by the industry (rather than their agents), or a perception that 'legal studies and business scholars tend to take neutral or positive stances towards fracking, and [appear] to ignore questions of fracking's potential environmental or social harms' (Lave and Lutz, 2014: 746). Such 'neutrality' may be off-putting to some researchers, who are perhaps better acquainted with the broader social science literature concerning CSG, which is often laden 'with claims that fracking has intensely negative environmental impacts' (Lave and Lutz, 2014: 745).

This article challenges such views by arguing, through the study of six recorded community forums, that an individual's legal expertise and social values are pertinent for their interactions with the wider community and potentially also the legal system – informing and influencing those around them: from law students (Hamman et al., 2014), to university legal educators (Graham, 2014; Carruthers et al., 2012; Author interview with Kate Galloway, 2014; Author phone interview with Dr Chris McGrath, 2014), government regulators (Hanson, 2011), industry and social movements. The term 'fracking' is itself subject to various connotations that have not gone unnoticed by lawyers in the United States, with at least one senior attorney in the Natural Resources Defense Council observing that: '[Fracking] obviously calls to mind other less socially polite terms, and folks have been able to take advantage of that' (Quoted in Evensen et al., 2014: 130; see also House, 2013). Law may be 'too important to be left to the lawyers' (Friedman, 1986: 780), but this does not mean that these socially privileged actors should be ignored in CSG analyses, given their involvement in so many aspects of this controversial resource. Individuals with legal training are not usually thought of as key actors in the social construction and contestation of landscapes (Blomley, 2014), but are nonetheless deeply implicated in shaping land use claims (Delaney, 2003). It is worth noting that the influence of lawyers has been interrogated fruitfully in many other contentious settings, such as wind energy lobbying (Songsore and Buzzelli, 2014; Doblinger and Soppe, 2013), carbon markets (Lovell and Ghaleigh, 2013), and urban planning arrangements (Davies and Atkinson, 2012).

As Turton (2015) has outlined, indications of the involvement of lawyers in Australian CSG developments can be gleaned from a wide array of sources, including: parliamentary

deliberations, government inquiries, legislation, court judgements, media reports, regulatory updates on law firm websites, as well as law and industry journals. Blogs authored by lawyers can be added to this list (AidanRicketts, 2015; McCullough Robertson, 2015). Lawyers have a significant input into CSG discussions across several platforms extending from academic commentary, to litigation advocacy, law reform, drafting legislation and their broader participation as concerned members of their community. Despite recognition of the blurred multiplicity of their roles in the socio-legal literature (Sugarman, 1994), and their strong presence in commentary surrounding CSG so far, lawyers themselves have not – as a group – been subjected to intensive analysis. While legal commentary relating to CSG is readily accessible to researchers (e.g. law journals and court judgments), it is important to recognise that wider socio-legal understandings of ‘the law’ encompass not only how it is represented in these official legal texts, but also how lawyers, lay people and social groups engage with, think about and contest legal concepts, formal law and legal ideologies (Barkan, 2011; Chouinard, 1994). Given that ‘law is lived’ (Chouinard, 1994: 432) and interpreted by people through everyday exchanges in society (Darian-Smith, 2013), there is merit in investigating how legal information about CSG is imparted to the general public by lawyers in Queensland and New South Wales through relatively informal settings, such as the community forum.

Seeking to challenge Lave and Lutz’s (2014) claim that legal commentary on unconventional gas is ‘neutral’ in much of its tone, this paper will examine how lawyers at six recorded CSG community forums relayed information about CSG laws as well as rhetoric about this resource, both in their presentations and in response to forum audience questions. Community CSG forums constitute informal engagements between the public and lawyer forum speakers, serving as occasions when so-called non-legal actors were drawn into the practice of the law (Jeffrey, 2011). Using the lens of legal geography – a stream of scholarship that seeks to explore how law is shaped by space and vice versa (Braverman et al., 2014) – it is argued that lawyers informed forum audience members about land access laws relating to CSG, responded to audience anxieties and questions about CSG by translating them into useable legal claims, and drew upon personal experiences of the CSG legal process to frame their calls for law reform at these forums (Martin et al., 2010). Reference is also made to publicly accessible media sources where relevant to illustrate the wider political and financial context of lawyer involvement in CSG disputes – suggesting its potential relevance to lawyer participation in community forums, with the absence of CSG industry lawyers from available recorded forums being acknowledged as a significant research gap.

As a controversial land use, CSG is fraught with data collection challenges for researchers and Section 2 discusses the reasons for relying primarily on recorded community forums and publicly accessible documentary sources rather than interviews with lawyers. After noting literature that addresses the place of lawyers in mediating between mining corporations and communities in Section 3.1, theoretical insights from legal geography briefly noted above are

explained further. Analysis of the six recorded community forums will then follow in Section 4, with a short background provided on their content in Section 4.1 before focussing on land access issues raised in the forums in Section 4.2. While the author cannot claim to offer a complete picture of the myriad interactions between lawyers, the general public and CSG – providing only a snapshot of one of the spaces occupied by this profession and this contested resource – potential areas for future research are noted, as are data collection obstacles.

## 2. Methods

Legal geography is a sub-discipline seemingly bereft of a common methodology (Delaney, 2015). This is partly a reflection of its disciplinary origins, as many legal geographers have been trained in the discipline of the law – which is arguably ‘not as reflective as many other disciplines about its methods’ (Braverman, 2014: 122; Fisher et al., 2009). However, there is growing recognition that discussing methodological choices is worthwhile in order to expand the horizons of legal geography (Braverman, 2014). Therefore, this research commenced with an acceptance of the diverse range of roles performed by lawyers in Australian society, drawing on Tomasic’s typology (1978), who conceived lawyer functions and associated lawyer occupations as falling into particular ‘types’: advocate (criminal lawyer), technician (academic lawyer), manager-planner (tax lawyer), holder of knowledge (commercial lawyer), advisor (corporate counsel), public servant bureaucrat (parliamentary counsel), investigator (litigation lawyer) and manipulator of situations (legal aid lawyer). Notably, an overarching definition of a ‘lawyer’ is elusive, beyond perhaps the unifying feature of all individuals holding legal qualifications (Howarth, 2013; Lovell and Ghaleigh, 2013). Some individuals would also wear several hats in Tomasic’s typology.

With a broad conception of the activities performed by lawyers in mind, a search was made for publicly accessible CSG community forums featuring contributions from lawyers. The search parameters have necessarily meant that some forums were excluded from analysis, by virtue of not being recorded, or having no accessible transcript (Anonymous, 2011b). A total of six recorded, publicly available community forums were found using combinations of the following search engine terms: ‘forum’, ‘seminar’, ‘meeting’, ‘CSG’, ‘coal seam gas’, ‘legal’, ‘lawyer’, ‘judge’, ‘solicitor’ and ‘barrister’ (Australian Earth Laws Alliance, 2012; Independent Coal Seam Gas Science Forum, 2014; Centre for Rural Regional Law and Justice Deakin University and the Environmental Defenders Office, 2014; Clarence Environment Centre, 2012; National Parks Association of NSW, 2011a, 2011b; Conservation Council SA, 2011). It is stressed that promotional material for some unrecorded community forums indicates a lack of CSG industry representation (legal or otherwise), or conversely, fails to include any perspectives from anti-CSG social movements (e.g. ManlyAustralia, 2015; Pro Bono Australia, 2014; Anonymous, 2010). In the six recorded forums available to the researcher, lawyers representing the CSG industry were found to be entirely absent (Australian Earth Laws Alliance, 2012; Independent Coal Seam Gas Science Forum, 2014; Centre for Rural Regional Law and Justice Deakin University and the

Environmental Defenders Office, 2014; Clarence Environment Centre, 2012), although non-legal industry representatives participated in two instances – with solicitors from the Environmental Defenders Office (EDO) (a community legal centre that has represented community groups challenging CSG developments) also present at the same forum (National Parks Association of NSW, 2011a, 2011b; Conservation Council SA, 2011). Unfortunately, some community forums were not available in any form beyond pre-event advertising, but indicated the intention of having legal representatives from the CSG industry as participants (e.g. McMullen, 2011). To the best of the researcher's knowledge, at the time of writing it would appear that the views of lawyers for the CSG industry at forums have not been recorded and were therefore unavailable for analysis. The researcher acknowledges that other CSG community forums have taken place and will likely continue to be held in the future (e.g. Cessnock City Council, 2015). However, only six of these were publicly accessible in a recorded form post-event.

It is unclear why many CSG forums are unrecorded. In view of the CSG industry's underrepresentation, it is clear that additional research will be required to fully assess the views of lawyers representing these stakeholders. The range of lawyer voices contributing to CSG commentary in the public sphere certainly deserves further investigation to assess any discernible trends. For example, are the repeated contributions of some lawyers on CSG issues (such as EDO solicitors) in the media a demonstration of advocacy from a vocal, networked minority (as suggested in other energy disputes, see Anderson, 2013), an indication of reporting preferences by journalists, evidence of deliberate public communication choices by the CSG industry, or a combination of all of these factors? Due to the aforementioned difficulties of access, the voices of lawyers from the CSG industry can only be inferred through the use of documentary sources in this article.

To partially redress this imbalance and capture related media coverage of CSG community forums, the researcher conducted extensive newspaper searches using the databases 'Factiva', 'Newsbank' and 'Google News'. Gas and legal industry websites such as 'Gas Today' and 'Lawyers Weekly' were also investigated, employing identical search terms to the ones used to locate community forums. While the content from industry websites is generally aimed at the legal profession at large or the gas and mining industries in general – with consequences for the depth of coverage of issues – such sources allowed a deeper understanding of newspaper reports devoted to the EDO's discussion of land access issues and the views of lawyers representing landholders, detailed in Section 4. The literature acknowledges the media's role as a significant disseminator of information about energy issues, including reporting on related matters such as climate change (e.g. Jaspal et al., 2014a; Jaspal and Nerlich, 2014; Paterson, 2014; Romanach et al., 2015; Speck, 2010). While audiovisual sources have been utilised by other researchers investigating unconventional gas (Jaspal et al. 2014b), there are certainly risks in drawing upon public media sources, with the potential for bias from any number of angles (e.g. Paterson, 2014; Foxwell-Norton, 2014; Wheeler-Jones et al., 2015). As with the above community forums, public



media sources sometimes fail to include a range of stakeholder interests in newspaper and radio reportage of lawyers involved in CSG disputes (e.g. 2GB 873AM, 2013; ABC Radio National Law Report, 2013; Anonymous, 2013; King and Bernard, 2013; Lloyd, 2013; Wells, 2014). There is also a tendency in the documentary sources to focus on key participants in the debate for ‘profile pieces’ (e.g. Cullen, 2014; Parkinson, 2014; McAlister, 2013; Jacques, 2013) that may not encompass a wide range of views, whether reporting comments about the need for legal advice from those acting for landholders (Pola, 2013), or the proceedings of a community meeting held for legal education purposes for lawyers and the general community (Murray, 2013).

The key reason for the study’s focus on audio recordings and publicly accessible documentary material is due to a lack of interview participation from lawyers contacted by the researcher. There are many potential reasons for this and the following indicative explanations were experienced by the researcher: a desire to only assist those who were willing to state an anti-CSG stance upfront ahead of the normal weighing of competing claims expected in academic research (Non-Government Organisation meeting November 2014); a refusal to comment as a public servant with expertise in drafting legislation due to a need for professional impartiality and political sensitivities (Pers Comm. with Government Officer October 2014); and a view expressed by a legal professional representing industry that they could not provide an interview due to ‘my involvement with the developments you are considering’ (Email from Legal Representative September 2014). Other attempts at contact were met with unanswered emails and phone calls. The researcher’s efforts to contact industry legal representatives at public events (e.g. a CSG forum held in 2014 with lawyers in the audience) were also unsuccessful. Although two interviews were obtained with university legal educators after ethical approval, as indicated in Section 1 (for details see Acknowledgements and References), these were not sufficient to constitute a representative sample. Previous Australian research involving lawyers connected with CSG has identified similar obstacles (Hanson, 2011) and it seems likely that this will continue to be problematic for future researchers, although interview access has been granted in some cases (e.g. Trigger et al., 2014) and lawyers have constituted the principal source of information for other legal geography studies (e.g. Terry, 2009). Lawyers might in fact benefit from increased engagement with CSG researchers, as their increased participation may be of value to existing law reform efforts by professional law associations that advocate in Australian energy debates (e.g. Anonymous, 2011a; Queensland Law Society, 2013-14). Finally, where unpublished sources are occasionally referred to (Bennetto, 2013; Hanson, 2011), information on public access procedures is provided in the References section. Despite the above limitations, extractive industry scholars have not been deterred from incorporating lawyers into their research.

### 3. A legal geography overview

#### 3.1 *Lawyers in the literature*

Lawyers have been sought out by researchers for their views on selected aspects of CSG, whether for analysis relating to trust and social licence or the preparation of Land Use Agreements by the CSG industry in its engagement with Indigenous Australians (Trigger et al., 2014; Bennetto, 2013). Others have considered the role of lawyers as a lobbying influence upon government to make changes to CSG-related water legislation on behalf of industry (Hanson, 2011), or used the observations made by lawyers in the course of government inquiries to craft wider narratives about the Australian CSG sector and contested landscapes (De Rijke, 2013). In the United States, the efforts of lawyers have been interpreted in the context of lease agreement negotiations between landowners and unconventional gas companies, with lawyers sometimes acting as a double-edged sword in successful negotiations (Liss, 2011). Similar conclusions have been made by those assessing the community engagement strategies of platinum operators in South Africa, indicating that the use of lawyers can change ‘the tone of community engagement...towards a more antagonist and legalistic one, by putting the company on the defensive’ (Farrell et al., 2012: 199). Lawyers are recognised as an elite professional group with expertise in navigating adversarial legal systems, enjoying status and privileged access in society as a result (Martin and Scherr, 2005). It is therefore unsurprising that the very presence of lawyers in a social dispute can alter its power dynamics (Martin et al., 2010).

Yet the literature acknowledges that lawyers also have a role to play in finding solutions to community relations issues that arise in the development of unconventional gas projects (Weems and Hwang, 2013). Beyond unconventional gas, the views of lawyers have been noted in research investigating extractive industries in Africa and the Americas (Pozas et al., 2015; Prno, 2013; Wan, 2014). Lawyers are not usually the primary focus of analysis, however, but are often included as part of a broader interview sample that encompasses other professional backgrounds (e.g. Trigger, et al., 2014; Willow et al., 2014).

Nonetheless, it is accepted that lawyers are a valuable resource for socio-legal research generally (Tomasic, 1978), partly because of their multi-faceted contributions to both the legal system and society as a whole (Ingleby and Johnstone, 1995). Historical legal silence and marginalisation of Indigenous Australians also presents a noteworthy contrast for at least one mining historian attempting to evaluate CSG development:

[W]hat can be ascertained in 2013 is that the farmers of eastern Australia are better educated, motivated, connected and legally positioned than the Indigenous peoples of...Australia [were] when miners came to acquire their land. [Knox, 2013: 353]

Australia has been fortunate not to suffer from such a dearth of legal expertise in the present era, but it has still proven necessary for government to provide legal aid funding to farmers seeking advice in relation to CSG exploration (Queensland Legal Aid, 2014). An absence of legal

expertise may complicate negotiations for industry, who might otherwise purposefully engage locally available counsel in a ‘facilitator’ role: someone with an understanding of the industry’s operational requirements and knowledge of those with whom the company must have dealings (Neumann, 1997: 145-46). Corporate reputation also appears to be a relevant consideration for negotiators. In her study of reputations and property rights in the Australian mining industry, Tuck (2012) highlights the importance of a company’s reputation in a community for the purposes of securing social licence and creating and then maintaining favourable property rights to resources. As shown above, the presence of lawyers has been acknowledged in the extractive industries literature, but legal geographers have only recently begun to consider the central role of lawyers in framing claims to places.

### *3.2 Introducing legal geography*

Focussing on the interconnections between law and spatiality, and their reciprocal construction, legal geographers contend that ‘nearly every aspect of law is located, takes place, is in motion, or has some spatial frame of reference’ (Braverman et al., 2014: 1). This interaction is of considerable interest to legal geographers, as law and space are treated as relational concepts that obtain meaning through social action (Blomley and Bakan, 1992). Building upon a wider legal geography scholarship (e.g. Bartel et al., 2013; Holmes, 2014; Braverman et al., 2014), an emerging literature in Australia and the United States has recently suggested ways in which this disciplinary enterprise might contribute constructively to community debates surrounding unconventional gas extraction (Turton, 2015; Andrews and McCarthy, 2014). Legal geographers have also begun to explore the role that lawyers have in exerting influence to bring about physical changes in the landscape (Martin et al., 2010). Lawyers are privileged social actors who make a specific legal sense of the world around them and create particular results by participating in the legal process, by virtue of their productive relationship to the law (Delaney, 2010). Lawyers’ specialised knowledge of the law is also used by societal interests to promote competing social representations of space (Mohr, 2003).

Martin et al. (2010) view lawyers as mediators between community concerns over geography, land use, development and the legal structures which may serve to address those anxieties. Belonging to an agency-centred strand of legal geography scholarship (Hatcher, 2010), Martin et al. argue that lawyers, as agents, ‘translate meaning from one form to another...[to] interpret and reconstitute their client’s claims and concerns into the language of the law’ (2010: 176, 188). In addition, the authors argue that lawyers ‘transform meaning by incorporating both societal norms and personal values...and exert power, altering existing social relations’ (2010: 176). Extending Martin et al.’s (2010) concept of ‘translation’ beyond direct lawyer-client interaction to encompass CSG forum audiences and the lawyers speaking to them, these community events are regarded as informal exchanges of legal knowledge where community understandings of the laws surrounding CSG are reframed into possible legal arguments by lawyer presenters.

Given that legal geography embraces not only formal laws but also informal rules and social norms (Bartel et al., 2013), community CSG forums are one means of looking behind the official legal texts associated with CSG (e.g. statutes and case law) to shed light on how ‘law is lived’, imagined and experienced by members of a society (Chouinard, 1994: 432; Darian-Smith, 2013). Informal understandings of the law are central to social life, with legal practices and discourses forming part of how individuals frame and assert control over the world around them (Blomley, 1994; Schmidt and McDermott, 2015). Therefore, the participation of lawyers in CSG community forums is approached as a manifestation of a public desire for information about land use changes arising from this industry’s expansion, presenting opportunities for lay perceptions of the law to be expressed by communities and for arguments about the use of landscapes to be aired to lawyers (Chouinard, 1994). In sharing their legal knowledge with clients, lawyers exercise their professional identity (Brigham, 2009). As participants in CSG forums, however, lawyers not only actively disseminate their knowledge and translate the law for a public audience, but also share their experiences and personal values as key negotiators in land access disputes associated with CSG development. As privileged legal actors, they may seek to exert influence on those attending forums, filtering legal information and opinions to audiences through the lens of their own lives and social values (Martin et al., 2010). Judges and lawyers are specialists in communicating the law to the broader community, spending a significant amount of their professional lives speaking and writing about the law. As a result, they also have an important influence on how non-expert members of the community understand the law (Howe, 2008). In focusing on community forums, a type of informal legal commentary on CSG in Australia is examined that is not discussed by Turton (2015), while also offering one means of redressing the general absence of lawyers from the legal geography literature (Martin et al., 2010). The above discussion highlights the value of studying the contributions of lawyers to extractive industries and suggests that community interactions with lawyers at public forums can be used to assess the translation efforts of these key legal actors. This is detailed further in the next section.

#### **4. Community forums**

##### *4.1 Background*

Significant content themes at the six recorded forums noted above in Section 2 related to land access, environmental regulation, opportunities for public participation in decision-making and arbitration. The emphasis of most of the forum presentations by lawyers was on describing and explaining the law surrounding CSG for the benefit of non-legal audiences. This is consistent with legal writing more generally (McGrath, 2010), and a reflection of the fact that lawyers are the product of a school of legal thought known as Legal Positivism. This jurisprudential concept encourages law students and lawyers alike to distinguish between what the law ‘is’ and what the law ‘ought’ to be (McGrath, 2010). While this philosophy is evident to varying degrees in the presentations of some forum presenters (Centre for Rural Regional Law and Justice Deakin University and the Environmental Defenders Office, 2014; Conservation Council SA, 2011), it

does not prevent the expression of personal views. For example, when providing a brief survey of the legal framework for CSG in Queensland for an environmental justice symposium, one member of the EDO opened their presentation with the comment that: ‘I don’t agree with it...but this is what it is and that’s how I’m going to set it out today’ (Hamman, 2012).

Given that the six recorded community forums located by the researcher all fail to include lawyers from the CSG industry on their panels, it should be said that critical viewpoints are expressed about the CSG industry in many of the opinions presented by lawyers and forum audience members. Indeed a lack of industry participation in one forum was pointed out to the press by the Australian Petroleum Production and Exploration Association (an industry lobby group) prior to being held, despite an open invitation seemingly being extended to the CSG industry by the event organisers (Thomas, 2014; Independent Coal Seam Gas Science Forum, 2014). Several of these forums were arranged by non-government environmental organisations and/or anti-CSG social movements. It is therefore to be expected that the views expressed at these events are somewhat reflective of the values espoused by those social movements. The personal politics of the lawyers taking part in the forums is also relevant, since a lawyer’s social values may find expression in the type of legal practice they pursue and in turn be reflected in the organisation they work for (Willow et al., 2014; Smith, 2006). This was usually acknowledged by the presenters. For example, Kirsty Ruddock, then a New South Wales EDO solicitor, noted at the outset of her presentation that:

What I’m going to talk to you today about is...the state of the law, but you have to bear in mind that I do have a perspective on this. Because obviously we are a legal centre that’s about improving environmental outcomes.  
[National Parks Association of NSW, 2011a]

It is worth noting that the EDO does not have a monopoly on informing individuals about CSG laws, with the assistance of lawyers being remarked upon by members of government inquiries, who utilised their expertise during deliberations over possible regulatory directions for CSG in both Queensland and New South Wales (New South Wales Parliament Legislative Council, 2012; Queensland Land Access Review Panel, 2012). Of course, contributions from lawyers towards proposed CSG regulatory matters are not always welcomed by government (Queensland Parliamentary Debates, 2014: 3017, 3018-19). Some community forums were arranged jointly between the EDO and universities (Australian Earth Laws Alliance, 2012; Centre for Rural Regional Law and Justice Deakin University and the Environmental Defenders Office, 2014), in what is arguably the continuation of a historical connection between higher education institutions and community legal centres in Australia that has existed since the 1970s (Noone, 1997). Lawyers participating in the community forums were also generally quick to acknowledge gaps in their expertise and experience with CSG. For example, during the unconventional gas forum convened by the Deakin University Centre for Rural Regional Law in March 2014, Glenn Martin of Shine Lawyers provided a snapshot of Queensland’s CSG land access laws then stated that:

[F]rom a landholder's perspective – and that's who I act for, I don't act for any mining companies or CSG companies – I'm reasonably comfortable with the way the legislation is at the moment. [Centre for Rural Regional Law and Justice Deakin University and the Environmental Defenders Office, 2014]

While these forums were organised independently of each other and largely as a means of bringing community members together to improve both legal and non-legal knowledge of CSG, legal information and arguments provided by lawyers at these forums had relevance to people far beyond the immediate audience at a particular community event. Calls for law reform by lawyers presenting at these community events can be appreciated in this light.

#### *4.2 Land access*

Frequent acknowledgment is made in all of the forums to the Crown's interest in CSG resources in Australia, namely that: the State is the title holder of the land on which CSG is extracted, owns the resource itself, may receive royalties for its extraction and is responsible for any environmental protection and socio-economic measures needed to protect the larger public interest from any negative consequences resulting from its development (Alfredson, 1987; Bouille et al., 2014). The State also adjudicates between these interests. Thus, when asked by a forum audience member in 2012 about possible mechanisms for resisting CSG exploration on their property, Sue Higginson, the Principal Solicitor for the New South Wales EDO, conceptualised her response not in terms of the individual's particular allotment of land or local circumstances, but through the spatial prism of the State and its jurisdiction in such matters. This generalised approach was also adopted by other solicitors at CSG forums (e.g. National Parks Association of NSW, 2011a; Conservation Council SA, 2011). Beyond simply noting that minerals are exploited for the benefit of all Australians by the Crown, Higginson noted one potential counterargument against CSG development under current legislation that underscores the State's multiple interests in mineral resources:

I would be saying at this point, trying to be a creative lawyer if there's such a thing...[that] the community is saying it's not to our benefit and therefore the New South Wales State Constitution [Act 1902]...that gives the New South Wales parliament all of its kind of powers to make laws...says [in section 5 of the Act] "for the good government" and "for the good of the New South Wales people". And we are saying, or the New South Wales people are saying that...right now the Petroleum (Onshore) Act [1991 (NSW)] is 100% not for the good of the New South Wales people – so I mean there are arguments in there. [Clarence Environment Centre, 2012]

Picking up on this reference to the New South Wales State Constitution in the same forum, a subsequent question was asked by another audience member as to whether there was a contradiction between that statute's grant of power to make laws for the good government of the people of New South Wales and the Petroleum (Onshore) Act 1991 (NSW), which enables the extraction of CSG, and was it therefore 'anticipated that there [would be]...a legal challenge to set some sort of precedent in this regard?' After clarifying that her earlier comments were not in

reference to the Constitution of the Commonwealth of Australia, but rather the New South Wales Constitution Act, Higginson cautioned that:

[T]he short answer would be no. I don't know of any argument that would have enough merit, that would experience enough prospects of succeeding [in litigation proceedings]...[W]hile we may be in a room of people that understand that the consequences of coal seam gas right now are probably very, very detrimental to the environment – what we also are dealing with is a community and a government and policy that thinks that coal seam gas extraction *is* in the interests of the New South Wales community somehow. Because it will be raising revenue, it is like the way we see mining. [Clarence Environment Centre, 2012]

These exchanges provide an example of what Martin et al. (2010) have described as one of the principal tasks of lawyers: translating the particular concerns and meanings of others (whether clients or other parties) into useable legal arguments, giving new meaning to the information they receive in the process, or at least attempting to do so in the above instance. Higginson presented the Crown's ownership of mineral resources as the political and legal status quo, but noted a vague argument in support of the audience member's question of a legal challenge through the New South Wales Constitution, despite holding a pragmatic view of its limited potential for success in litigation. The governance of social conduct by the law is linked with how people perceive social spaces (Herbert, 2014) and lawyers may view community understandings of rural places as incompatible with the laws surrounding CSG, as described by audience members at community forums and elsewhere. The fact that Higginson mentioned the New South Wales Constitution Act as a possible legal argument, however remote, engages with the question of how communities grapple with notions of place and translate those legally unstable ideas into not only legal rhetoric, but perhaps also legally plausible actions (Martin et al., 2010). Despite having little prospects of litigation success, the vexed political issue of CSG land access and State powers to grant licences for CSG extraction has continued to be visible in the public debate, with attempts being made to change mineral resource ownership through legislation at the national level. At the time of writing, public submissions were being received for a proposed Landholders' Rights to Refuse (Gas and Coal) Bill 2015, introduced by Senator Larissa Waters, a member of the Australian Greens party. The Bill is intended to provide Australian landholders with the right to refuse the commencement of unconventional gas and coal mining activities on their land without prior written authorisation (Senate Standing Committees on Environment and Communications, 2015). Whether or not the Bill is passed (similar proposals have failed to enter into law previously, e.g. Landholders' Right to Refuse (Coal Seam Gas) Bill 2011), lawyers provide an important educational service in correcting misplaced public understandings of land ownership in Australia at community forums and elsewhere (Boulle et al., 2014).

While informing forum audiences about the nature of Crown ownership of mineral resources is a significant aspect of all the forums, combining descriptions of the law with personal experiences is also common. Doing so may also give rise to questions of space, law and power.

An example of this can be found in the discussion given over to arbitration processes by two CSG forum speakers at the Independent Coal Seam Gas Science Forum held in the New South Wales parliament in 2014. Two speakers raised concerns that some CSG companies had allegedly sought to prevent lawyers from taking part in the arbitration process with landholders. Arbitration arises when the holder of a CSG exploration licence and a landholder are unable to agree on the terms of an access agreement and therefore turn to an arbitrator to determine an appropriate arrangement between the parties, as without this agreement exploration cannot proceed (New South Wales Trade and Investment Resources and Energy, 2015). The arbitrator will impose a decision as to the contents of a land access arrangement (i.e. access routes, types of activity to be permitted, duration of agreement, financial compensation, environmental protection measures and so on), having regard to the arguments of the parties. If however a landholder rejects the arbitrator's decision, a final appeal can be made in the New South Wales Land and Environment Court (New South Wales Trade and Investment Resources and Energy, 2015; Petroleum (Onshore) Act 1991 (New South Wales), ss 69F, 69L, 69M, 69N).

Legal representation during arbitration requires the consent of all parties (*Mining Act 1992* (New South Wales), s 146; *Petroleum (Onshore) Act 1991* (New South Wales), s 69I). Sue Higginson contended at the Independent Coal Seam Gas Science Forum (2014) that:

[T]he experience at the moment is that some of the companies are not agreeing to landholders having a legal representative to assist them. So you might find that you as the landholder are sitting in a room arbitrating with an extremely experienced...well qualified...CSG exploration company.

Endorsing Higginson's suggestion of a power imbalance, Ian Coleman SC, a legal representative for landholders impacted by CSG, argued that procedural fairness was put at risk in landholder-explorer arbitrations when some parties were told 'it would be better if we kept the lawyers out of it' (Independent Coal Seam Gas Science Forum, 2014). Procedural fairness is a central tenet of Australian administrative law and is concerned with the right to a fair hearing and the right to an unbiased decision (Head, 2012). Coleman claimed that:

[R]ecently we had an experience where...we were led to believe that the company would go along with our clients being legally represented. [W]e outed ourselves and instead of a letter from the lawyers, we got one from the environmental manager...of the company [suggesting that the lawyers be excluded]...[T]he lawyers are only literally kept out of the room where the arbitration is happening. Everything else is orchestrated by lawyers...So right from the start if you have any concept of procedural fairness, natural justice, broader concepts of justice, you become fairly nervous about this whole process. [Independent Coal Seam Gas Science Forum, 2014]

While specific statements countering the above criticisms from Higginson and Coleman are lacking, one lawyer has argued that complaints about the conduct of CSG operators in relation to land access more generally 'can sometimes be an attempt by landowners to increase compensation payments' (Nunan, 2008: 41). The CSG industry, in New South Wales at least, has also taken steps to ease land access concerns with its 'Agreed Principles of Land Access' signed between



AGL, Santos, NSW Farmers, Cotton Australia and the New South Wales Irrigators Council (Fulcher and Eaton, 2014). It is also notable that legislative proposals designed to increase legal representation at arbitration have not been well received by the New South Wales Minerals Council (an industry lobby group), which suggests that such a move could transform the process into a ‘pseudo court hearing’ (2014: 9). The Council views this as an unhelpful development, believing that ‘arbitration has been used as a tactic [by some landholders] to delay and add cost to an exploration program’ (New South Wales Minerals Council, 2014: 9). Coleman’s contention that the exclusion of lawyers damages the prospects of procedural fairness relates to the perceived fairness of decision-making processes (Gross, 2014) and taps into a larger debate as to whether or not lawyers are necessary to ensure that ‘justice’, procedural or otherwise, is done – a question which has been debated for many decades by law and justice scholars (Denning, 1955; Economides et al., 1986; Gross, 2014; Sackville, 2014; Delaney, 2015).

Arbitration is a legal mechanism for ensuring that land access agreements are reached between CSG operators and landholders, the legally enforceable decisions of arbitrators ultimately helping to shape both the physical and economic geographies of landscapes (Platt, 2014). Yet the physical spaces in which the arbitration occurs may also constitute a legal geography, with the presence of lawyers arguably creating an atmosphere where power, procedures, legal authority and credentials are projected on to those taking part – in much the same fashion as formal courts (Jeffrey and Jakala, 2014). Clearly there are differences of opinion as to the appropriateness of an increased role for lawyers in arbitration proceedings. Although Martin et al. (2010) refer to a lawyer’s capacity to exert power over others to resolve a client’s problem, the absence of these legal actors may result in another type of power shift, noted in the literature on a larger scale in the limited legal capacity of developing nations to bargain effectively with multinational corporations (Kolstad and Søreide, 2009). Whether or not the use of lawyers during arbitration results in positive outcomes for all participants, the criticisms of Coleman and Higginson appear to have been acknowledged by government and the New South Wales Law Society (2014). Amendments proposed for the New South Wales parliament in 2015 may alter the statutory arrangements that currently require both parties to consent to legal representation during arbitration (New South Wales Trade and Investment Resources and Energy, 2014), a change originally recommended in a review of the New South Wales mining arbitration framework (Walker, 2014). Such a change could address some of the concerns to which Coleman in particular has referred on several occasions (Coleman, 2014a, 2014b; Foley, 2014; McCarthy, 2014).

By bringing attention to the role of lawyers in arbitration proceedings at the beginning of the community forum, Higginson and Coleman reinterpret the concept of arbitration from a purely necessary step in a land access negotiation process in New South Wales, to a conflict over procedural fairness, explaining the law yet also critiquing it for the forum audience by discussing their personal experiences with arbitration proceedings. Yet, as noted in Section 2, an absence of

CSG industry viewpoints in the forums discussed highlights a need for caution when weighing opinions about CSG – as clearly negotiation experiences will differ between landowners for various reasons (Liss, 2011). This can also be seen in the context of other extractive industries in Australia (e.g. O'Brien, 2015). Because forums present opportunities for exchanges of ideas and information in relation to CSG, it is worthwhile examining some of the possible motivations that may have led these lawyers to participate in these events, noting that unconventional gas attracts a wide range of stakeholders – some of whom wish to implement changes to the laws governing it (Liss and Murphy, 2014).

As noted in Section 1, lawyers act as agents for others and exert power over others as socially privileged actors (Martin et al., 2010). The lawyers who presented at the CSG forums discussed above appeared to be motivated by the desire to raise law reform concerns and to educate the community about the legal frameworks surrounding CSG (e.g. National Parks Association of NSW, 2011a). Although not discussed in the recorded forums, larger contextual issues associated with lawyers engaged in CSG matters should be acknowledged, as these may have some bearing on the views that were expressed in the recorded community forums. The fact that some Australian law firms deliberately highlight their 'CSG law experts' for advertising purposes (e.g. Oliver, 2014; Shine Lawyers, 2014; Donnie Harris Law, 2014; Ferrier and Co., 2014a, 2014b; Emanate Legal, 2015) is potentially relevant when weighing up CSG commentary made by lawyers – as both community forums and media engagement may constitute opportunities to advertise their expertise rapidly and at small expense. One commentator has even suggested that small law firms could consider specialising in CSG as a 'quirky sub-area of law', in the interests of 'niching down' to increase their profits within a competitive market (Burton-Bradley, 2015).

The legal businesses associated with CSG are not necessarily small, however, and there have been opportunities for some leading law firms to significantly expand their services in this practice area (Whealing, 2011; Mezrani, 2014; Chaffrey, 2012). This is not a criticism of lawyers and their obvious need to operate effective businesses, but rather recognition of the complexities of public statements made by lawyers about CSG in Australia. It is both simplistic and unhelpful to resort to caricatures of lawyer motivations – the self-serving propagator of litigation, the larger-than-life public interest advocate or the 'neutral technician' bringing "legal" drafting and advocacy skills to bear in solving client problems – as these are already prominent in socio-legal studies and popular literature (Sugarman, 1994: 123).

But such images can serve to highlight gaps and silences in the voices of lawyers speaking publicly about CSG, as these are not always acknowledged in media coverage or indeed at CSG community forums. For example, in 2010, Peter Shannon (a prominent CSG commentator and solicitor from Shine Lawyers acting for landholders) drew attention to what he believed were membership links between legal firms acting for CSG companies and the Queensland Resources Council (a mining industry lobby group), suggesting that many law firms were financially bound to the CSG industry's future. While his assessment may be based on reasonable observation, it is

also partial, as he did not mention his employer's financial stake in the industry's expansion (Scott, 2010). In the absence of a financial incentive, lawyers may use the media and community forums to air political opposition to CSG. This was acknowledged by Sue Higginson in a community forum in 2012:

[T]he rights of a landholder [to prevent CSG exploration]...are...subservient to the rights of a company that has the grant of a...coal seam gas title...For that position to change, the law needs to change...Clearly what we have, and I said it tonight on Channel 7 News...[is a] law that has allowed...coal seam gas companies to race ahead of the thought of landholders and the environment. [Clarence Environment Centre, 2012]

Further analysis of other forums aimed at both the CSG industry and the broader community would no doubt reveal additional information as to the motivations of participants. Martin et al. (2010) certainly discuss how lawyers translate the anxieties of clients into useable legal claims and exert influence over others by combining legal principles with personal values. But it would also be worthwhile investigating how the opinions of lawyers are used by communities themselves to craft messages both for and against the CSG industry's operation. For instance, legal advice received by a local government council in New South Wales regarding its ability to prevent CSG operators from using council-owned roads was publicly reported in the local newspaper less than a month before residents voted on whether the community supported CSG exploration and production within council boundaries (Harlum, 2012; Luke et al., 2013; Luke et al., 2014). The role of lawyers in shaping community views and perhaps driving legal empowerment in regions connected with the CSG industry could be a subject for future research.

## 5. Conclusion

From the information presented above in six community CSG forums, it has been shown that lawyers are a key constituency in Australia's CSG discussions and are regularly utilised in both forums and the media to provide information about the legal ramifications of CSG to the wider community. In Section 2, the glaring absence of CSG industry lawyers from the available recorded CSG forums was noted as problematic for a full assessment of the profession's participation in this setting. Drawing upon legal geography literature to approach the forums as informal engagements between lawyers and members of the general public, opinions expressed by lawyers at community forums were found to contain both descriptions of the legal process and personal reflections on their experiences as legal actors involved with this resource.

In engaging with audience members on questions about the Crown's ownership of mineral resources, land access arrangements and arbitration, lawyers acted as legal educators and moulded community concerns into workable legal claims. Lawyers also attempted to exert influence over forum audiences as bearers of legal knowledge, seeking law reform on CSG matters. In critiquing CSG legal arrangements, lawyers shape community understandings of physical places and give voice to issues of power and exclusion. Beyond a desire for law reform and political concerns, financial and advertising motivations for the participation of lawyers in both media and forum

CSG commentary were acknowledged as potentially relevant. It is to be hoped that future CSG research will consider lawyers in greater depth, in view of the scope of their involvement with this controversial energy source.

### Acknowledgements

This research was funded by an Australian Government Postgraduate Award Scholarship and a Supplementary Scholarship from the Fenner School of Environment and Society, Australian National University. Interviews conducted by the author were carried out the approval of the ANU Human Research Ethics Committee, protocol number 2014/433. I wish to thank Professor Stephen Dovers, Associate Professor Karen Hussey and Dr Thomas Measham for their helpful suggestions on earlier drafts of this manuscript. I am also grateful to the interviewees for their insights and time.

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## Chapter 6: Legal determinations, geography and justice in Australia's coal seam gas debate

This chapter was published as David J. Turton, 2017, 'Legal determinations, geography and justice in Australia's coal seam gas debate. In: A. Lukasiewicz, S. Dovers, L. Robin, J. McKay, S. Schilizzi and S. Graham (Eds.), *Natural Resources and Environmental Justice: Australian Perspectives*. CSIRO Publishing, Clayton South, Victoria, pp. 155-167. See Appendix 4 for published version.

### Summary

Social and environmental justice issues loom large in Australia's coal seam gas (CSG) debate. This chapter will draw on relevant Australian judicial decisions and related literature to show how aspects of procedural and distributive justice have arisen for a variety of stakeholders associated with CSG extraction. Noting that social justice questions have been considered by geographers in the past and that aspects of spatial justice figure prominently in the work of legal geographers, this chapter focuses on the spatial and temporal features of CSG in Australia from an environmental and social justice perspective – using court judgments as short, illustrative case studies. Because both law and landscapes are shaped by contests over what is deemed just and unjust in society, this chapter also responds to recent calls for greater attention to justice questions by legal geography and justice scholars.

### Introduction

Coal seam gas (CSG) is a regular feature of Australian newspaper headlines and is a politically charged topic for many communities, particularly in Queensland and New South Wales (e.g. Manning 2012; Munro 2012; Sherval and Hardiman 2014). Calls to expand this industry, which involves the extraction of methane from underground coal seams, have been driven partly by arguments that the adoption of CSG is a necessary step towards reducing fossil fuel emissions in the wider context of combating anthropogenic climate change (Lacey and Lamont 2014). It is notable that research into the possible greenhouse benefits of CSG over more conventional fossil fuel sources (such as oil and coal) remain ongoing against a need for greater consistency in the environmental impact assessment of CSG projects in Australia (Vickas et al. 2015). The potential of unconventional gas (encompassing CSG, tight gas and shale gas) to serve as alternatives to coal and oil in a lower carbon emitting energy future has also been questioned (e.g. Stephenson et al. 2012). The anti-CSG social movement Lock the Gate has sought to challenge the political support that exists for this industry by drawing attention to private property rights, the potential of CSG to threaten the economic viability of productive farming land and the ability of farmers to determine whether or not the industry should proceed on an individual's land (Colvin et al. 2015). Support for Lock the Gate's position exists among some federal politicians (e.g. ABC



News 2015c), but as approvals for CSG developments lie largely with state governments, calls by these individuals for a farmers' right to 'say no' to CSG have been described by one commentator as politically opportunistic 'flip-flopping' (Windsor 2015: 193).

Other criticisms of the CSG sector relate to potential risks to water aquifers, aboveground spills of so-called 'produced water' arising from the extractive process (including 'fracking'), fugitive methane emissions, and the possibility of cumulative risks to ecosystems caused by necessary infrastructure such as roads and pipelines (e.g. Tan et al. 2015). It is important to note that the CSG industry is not without its supporters in rural and regional Australia, with some commentators arguing that CSG represents an economic boon to communities with potentially positive socio-economic impacts (e.g. Office of the Chief Economist 2015; Gribbin 2015; Schwartz 2015). In view of these contested perspectives, it is not surprising that notions of justice and fairness loom large in this community debate (e.g. Christie 2012; Munro 2012; Maloney 2014). Although Australia's CSG debate is certainly played out in urban centres – for example, through protests at sites of CSG extraction (such as AGL's Camden operation near Sydney in New South Wales, see Smith 2016) – arguments for and against the development of CSG revolve primarily around differing visions for the future of rural and regional Australia. Justice in this context is revealed in the tension between those who view CSG as a resource to be developed in the national interest – with potentially positive spill-over benefits into parts of rural and regional Australia – and those who fear that expanding this industry risks harming the future viability of existing agricultural business operations and the communities that exist around them. The challenge of finding an equitable path between these viewpoints remains ongoing. It is worth noting that arguments for and against CSG have been made against a larger background of declining populations, reduced service provision, drought, economic restructuring and cultural divisions in rural and regional Australia (e.g. Gross 2015), with some people contending that CSG provides a means of reversing and ameliorating these losses. These divergent aspirations for the future are also present in the existing CSG litigation discussed below.

Focusing on judicial determinations relating to CSG necessarily means reducing the scope of the chapter, with an emphasis towards what Marcel Wissenburg has described as the legal aspects of justice – 'more or less synonymous with positive law' – rather than moral or normative elements of justice (quoted in Gross 2014: 24). Narrowing in on judicial determinations also runs the risk of categorising the judiciary as a coherent, unified body, which is not necessarily the case (Hammerslev 2005). Judges are not disinterested observers in the CSG debate either, but rather key actors who nonetheless claim to have a neutral stance on the contentious issues brought before them (Delaney 2010). In focusing on questions of justice in the realm of CSG-related litigation, it is noted from the outset that law and justice do not always intersect, yet have the capacity to do so – as observed recently by Ronald Sackville QC, a former Judge of the Federal Court of Australia (Sackville 2014: 1162):

Law can be a powerful instrument of injustice, particularly in its impact on poor and vulnerable groups in the community. Yet law can also be a powerful force for the elimination or amelioration of injustice, especially through carefully designed legislative reforms supported by adequate mechanisms for their implementation.

Australian litigation relating to CSG has involved not only government and anti-CSG community groups (e.g. *Fullerton Cove Residents Action Group Inc v Dart Energy Ltd (No 2)* [2013] NSWLEC 38; *Police v Rankin*; *Police v Roberts* [2013] NSWLC 25), but also CSG companies and their contractors (*AGL Sales (Qld) P/L v Dawson Sales P/L & Ors* [2009] QCA 262; *Saipem Australia Pty Ltd v GLNG Operations Pty Ltd* [2014] QSC 310). Such trends are replicated internationally and seem likely to continue (Preston 2014; Mulcahy 2015). Other cases have considered: freedom of information requests about the police response to anti-CSG protests (*Shoebridge v The Office of the Minister for Police and Emergency Services* [2014] NSWCATAD 189); the distribution of financial benefits of CSG to local government in the form of rates (*APT Petroleum Pipelines Pty Ltd v Western Downs Regional Council* [2014] QLC 18); and the use of fines as a deterrent following a failure to report environmental harm (*Connell v Santos NSW Pty Limited* [2014] NSWLEC 1). Not all of these cases can be considered here, nor are all of these judgments relevant to procedural and distributive justice – despite being indicative of a sometimes vitriolic community debate. An example of this can be seen in a recent defamation suit involving comments made by a talkback radio host about CSG and the then Deputy Premier of New South Wales, Andrew Stoner (*Stoner v Jones* [2015] NSWSC 585).

This chapter therefore draws upon relevant Australian judicial decisions to showcase how aspects of procedural and distributive justice have arisen for a variety of stakeholders associated with CSG extraction. By doing so, this chapter contributes to existing literature in the sub-discipline of legal geography and builds upon a growing interest in justice related research in that field. Contending that these judicial cases are symptomatic of key themes in the wider CSG community debate (such as public participation), it is argued that the potential risks and benefits of CSG provide an opportunity to examine procedural and distributive justice issues in this public debate from various temporal and spatial perspectives, adding to existing geographical studies of environmental and social justice (Smith 1994; Cotton et al. 2014) – as well as emerging justice literature on unconventional gas more broadly (e.g. Fry et al. 2015; Ogneva-Himmelberger and Huang 2015; Clough and Bell 2016).

Going beyond a purely legalistic analysis of CSG court cases (e.g. Preston 2014), this chapter highlights the socio-political context that surrounds CSG litigation, because the court cases discussed are in many ways manifestations of larger themes in Australia's CSG discussion. Engaging with the existing domestic and international unconventional gas literature, it will be argued that Australian courts play an important role in driving improvements to stakeholder interaction and ultimately the quality of justice outcomes sought by various parties in the Australian CSG debate – despite their frequent reluctance to comment on the merits of CSG per

se. A short clarification is necessary before canvassing the first judicial case study in this chapter. This concerns the concept of legal geography. For the purposes of this chapter, legal geography is approached as:

[A] stream of scholarship that makes the interconnections between law and spatiality, and especially their reciprocal construction, into core objects of inquiry. Legal geographers contend that in the world of lived social relations and experience, aspects of the law that are analytically identified as either legal or spatial are conjoined and co-constitutive. (Braverman et al. 2014: 1)

With a long tradition of commentators exploring the connections between law and justice (Kearns and Sarat 1996; Sackville 2014), it is not surprising that legal geographers have also delved into the realm of justice, often by examining spatial injustice and the law's role in constraining and enabling such power dynamics (Delaney 2016). Law and landscapes are shaped 'by contestations over what is considered just and unjust in different societies' (Jones 2006: 1). Indeed many legal geographers seek to engage with 'systemic asymmetries of power, such as domination, exploitation, and marginalization both in the world and with respect to access to law' (Delaney 2016: 268; see also Silbey 2001). The two key aspects of justice to be considered below are procedural and distributive justice. An early instance of procedural justice issues emerging in the context of CSG can be seen in the Baker decision, analysed below.

### **Procedural justice: Baker v Minister for Employment, Skills and Mining & Another**

Legal meanings are projected on to 'every segment of the physical world' (Braverman et al. 2014: 1). These meanings are not fixed, but are instead shaped and reshaped by 'contested social practices and material realities' (Jepson 2012: 616). As an element of the legal process, litigation has a significant role to play in creating spaces, through judicial interpretations of time and geography (Benson 2014). Discussions of space are also relevant in negotiations between landholders and CSG companies, particularly where it serves as grounds for judicial review of government decision making. In 2011, QCLNG Pipeline Pty Ltd was engaged in negotiations with the Eidsvoid grazier Michael Baker to install a CSG pipeline across a portion of his property in the North Burnett region of Queensland. This was part of QCLNG's plan to construct a CSG pipeline from the Surat Basin to the industrial port of Gladstone in central Queensland. QCLNG's failure to provide Baker with an appropriately scaled map of the property that would be used for the pipeline was found to be a denial of procedural fairness. Procedural fairness is a fundamental concept of Australian administrative law and is premised on the idea that a person who might be adversely affected by an administrative decision must be given a fair hearing before a decision is made. In this case, procedural fairness required that QCLNG provide Baker with sufficient information to be able to participate meaningfully in the decision-making process with the company and also be permitted a reasonable opportunity to respond to QCLNG's pipeline application before a decision was made by the Queensland Department of Natural Resources and Mines. In her findings, Justice Jean Dalton observed that:

Remarkably enough, the application lodged on behalf of QCLNG did not contain a precise description of the land over which ... permission [for access] was sought, either in words, or in the two maps which were part of the application ... The realigned pipeline was nowhere shown on the material in the application and the map showing the original pipeline was at such a scale as to be meaningless to someone trying to ascertain where exactly the proposed pipeline land would run over Mr Baker's property (*Baker v Minister for Employment, Skills and Mining & Another* [2012] QSC 160: [23], [24]).

Because Baker lacked a precise map of QCLNG's pipeline route and was not given accurate mapping information in sufficient time to respond to QCLNG's application to the Department (only being informed of the modified scale arrangements proposed by QCLNG a mere 2 days before the 28-day statutory notification period expired), Justice Dalton concluded Baker did not receive procedural fairness. As a consequence, she ruled that the Department's decision to grant QCLNG access in that particular location was void (*Baker v Minister for Employment, Skills and Mining & Another* [2012] QSC 160). In this instance, judicial understandings of time and space converged to create legal consequences for QCLNG and Baker (Turton 2015a). Scale is, of course, a politically constructed concept and its use in the legal arena is frequent, particularly in relation to matters of jurisdiction (Valverde 2009). Following Justice Dalton's decision, QCLNG claimed that their application failed on a mere 'technicality' (Gribbin 2012), but since this decision was handed down, no similar cause of action has yet been pursued by a landholder against a CSG company – suggesting that CSG operators have learned from the experience and become far more cautious in providing accurate geographical information to those with whom they are seeking to negotiate access for pipeline purposes and beyond.

Similar issues regarding the adequacy of geographical information arose before the Baker decision in *O'Connor & O'Connor v Arrow (Daandine) Pty Ltd* [2009] QSC 432, when an entry notice for the construction of a CSG water treatment pipeline was found to be void for failing to give sufficient particulars to a landholder. As Geritz et al. (2012) warned:

Given the conclusions in [the] Arrow Daandine and Baker [judgments], project proponents should be very careful in the descriptions that they provide to owners (and occupiers where relevant) in notices (including negotiation notices, Consultation Notices and notices of entry) under the various pieces of resources legislation. The lack of such precision could result in the notice being found to be void and the activities subsequently conducted being unlawful.

A greater attention to land access information by CSG companies has perhaps also been encouraged by wide coverage of Justice Dalton's decision in Baker, both within legal circles and the press (e.g. Geritz et al. 2012; Hairsine and McCarthy 2012; Wilson and Jacques 2012). The above cases consider aspects of procedural justice in a geographical context, whether in terms of open and transparent information-sharing or allowing sufficient time for stakeholders to reach a considered decision. It is stressed that legal commentary on procedural justice as it relates to CSG in Australia has not been limited to the courts and professional journals, but can also be found in

less formal settings, including CSG community forums that have featured lawyers as presenters on speaker panels (Turton 2015b).

Despite their importance in improving justice processes and outcomes, judges have emphasised their limited capacity to resolve the larger community debate surrounding CSG, as observed by Justice Pepper of the New South Wales Land and Environment Court:

Coal seam gas is contentious. This judgment will, however, do little to quell the current anxiety surrounding the coal seam gas mining debate. In this regard it must be understood that the merits, or otherwise, of the use of this resource are irrelevant to the issues raised for determination by these judicial review proceedings, concerning, as they do, only the lawfulness of the approval under challenge (*Barrington-Gloucester-Stroud Preservation Alliance Inc v Minister for Planning and Infrastructure* [2012] 194 LGERA 113: 117).

This is not to suggest that the judiciary has been blind to the political undercurrent that surrounds CSG. Indeed, in one case concerning a vexatious prosecution launched by the New South Wales police against two anti-CSG protesters in 2013, the presiding magistrate strongly criticised the role of politics as a potential source of interference with proper criminal justice procedures and a waste of the court's time and resources (*Police v Rankin; Police v Roberts* [2013] NSWLC 25). This privileged arm of the legal profession has also been required to consider geographical questions in relation to particular spaces, which can indirectly influence the community debate. The law is bound up with space in surprising ways and this extends to the ways in which spatial tactics are infused with legal terms and offences. Criminal law, for instance, is filled with prohibitive measures designed to inhibit movement through space – indeed criminal offences such as homicide are laden with spatial and temporal features (e.g. Sylvestre et al. 2015), particularly in setting out the requisite elements needed to establish a criminal act (Farmer 2010).

Spatial and legal interplay can be seen in the types of relief sought between CSG operators and community group litigants: for example, the seeking of an injunction (a remedy long associated with the restraint of behaviour in particular places, Blandy and Sibley 2010) by an anti-CSG community group, so as to prevent a CSG operator from constructing infrastructure required for a pilot exploration program until substantive legal arguments about the environmental impacts of the proposal could be heard (*Fullerton Cove Residents Action Group Incorporated v Dart Energy Ltd* [2012] NSWLEC 207). In granting the injunction, Justice Sheahan ordered a temporary halt to the potential physical and economic geography of the exploration site (Platt 2014). This freeze on exploration activity was subsequently lifted on appeal (*Fullerton Cove Residents Action Group Inc v Dart Energy Ltd (No 2)* [2013] NSWLEC 38), but the proponent, Dart Energy, ceased exploration work in 2013. At the time of writing, the CSG licence for this region remains current, with some residents of Fullerton in the Lower Hunter Valley region suggesting that the New South Wales Government should cancel the licence following the expiration of a CSG licence buyback scheme instituted after community backlash against the CSG industry in that state (ABC News 2015a). Another important case concerning matters central to procedural justice in CSG decision making was the decision of Justice Button in *Metgasco*

*Limited v Minister for Resources and Energy* [2015] NSWSC 453. This judgment (and its aftermath) poses particular questions about the nature of public participation: a core tenet of procedural justice.

**‘Effective’ consultation: Metgasco Limited v Minister for Resources and Energy**

Metgasco was a CSG company that held a licence for petroleum exploration at Bentley in the New South Wales North Coast region. This licence was initially issued under the Petroleum (Onshore) Act 1991 (NSW) in November 1996. After presenting a CSG exploration program to the responsible Minister for Resources and Energy in March 2013, a delegate of the Minister approved the company’s exploration plans on 6 February 2014. The CSG exploration licence related to a drilling site known as Rosella Well, located on freehold private land within a former gravel quarry. Approval for the licence was partly contingent upon Metgasco demonstrating adequate community consultation efforts, in addition to preparing the site sufficiently for exploration purposes. Despite Metgasco’s efforts to engage the community, community opposition to CSG at Bentley remained strong – with public demonstrations at Metgasco’s drilling site before the New South Wales state election. On 14 May 2014, the Minister’s delegate, Rachel Connell, informed Metgasco of her decision to suspend operations at the Rosella site under section 22 of the Petroleum (Onshore) Act, due to an alleged failure by Metgasco to fulfil conditions to their CSG licence. Specifically, Rachel Connell determined that Metgasco had breached New South Wales Strategic Regional Land Use Policy delivery guidelines, entitled ‘Guidelines for community consultation requirements for the extraction of coal and petroleum, including coal seam gas’ (‘the Guidelines’). Connell contended that Metgasco had failed in its community consultation obligations under the Guidelines, developing a ‘defeatist attitude’ to community consultation and claimed that Metgasco’s representatives ‘lacked the necessary skills to engage with an often hostile audience’ (*Metgasco Limited v Minister for Resources and Energy* [2015] NSWSC 453: [31]). The court proceedings arose when Metgasco applied for judicial review of the Minister’s decision to suspend their activities, after failing to secure an internal ‘review’ of the decision with the delegate concerned. Metgasco contended that the delegate’s decision was unlawful and sought a declaration from the Court to this effect. The Guidelines stipulate that licence holders should seek to engage in ‘genuine and effective participation’, as ‘an integral component’ of their exploration activities (*Metgasco Limited v Minister for Resources and Energy* [2015] NSWSC 453: [13]).

Justice Button noted that Metgasco’s consultation activities with the community included one-on-one meetings with landholders, letter box information drops, the signing of land access agreements, open community meetings in Casino and telephone communications to deal with concerns. Discussing the history of community opposition to CSG at the Rosella site, including the existence of a protest camp adjacent to drilling operations, Button observed that the Minister had not permitted Metgasco sufficient time to respond to the delegate’s decision to suspend the Rosella licence, as required under the Act. Justice Button described the May 2014 suspension of

Metgasco's licence as 'a bolt from the blue' as far as the company was concerned (*Metgasco Limited v Minister for Resources and Energy* [2015] NSWSC 453: [41]). The Minister contended that Metgasco had failed to engage in 'effective consultation' because, despite its community consultation program, widespread opposition to the Rosella project continued. On this point Justice Button took the view that:

[A] reading of the guidelines as a whole shows that they are speaking of what is required in terms of the *activities* of the person or body engaging in consultation, rather than focusing on the *results* of the consultation upon the minds of the persons being consulted...[T]he guidelines are not prescriptive and ... have the tone of constructive suggestions rather than firm commands. And construing them as a whole, their reference to '*effective consultation*' to my mind focuses on the quality of the process of consultation, rather than on any outcome whereby the persons who are the focus of the consultation are persuaded by it (*Metgasco Limited v Minister for Resources and Energy* [2015] NSWSC 453: [69]. Emphasis in original).

Justice Button concluded that the delegate's decision to suspend Metgasco's licence had attached a substantial significance to anti-CSG community activism in the region, instead of focusing on Metgasco's efforts to consult with the community. In doing so, the Minister had given attention to an irrelevant consideration when reaching a decision about licence suspension. For these reasons, the suspension of Metgasco's licence was declared to be invalid. The Metgasco decision is significant for its examination of public participation as a key aspect of procedural justice, attending to the nature of proper decision making by government authorities who are faced with community protest over a controversial resource.

The case is also an illustration of how litigation can be used in large-scale community debates as an important testing ground for core concepts of justice, providing an opportunity for all parties to re-assess their approach and perhaps improve community consultation and planning post-judgment. Litigation can be used as a means of giving authoritative expression to procedural justice principles (such as equity and fairness), allowing room for improved processes to support future interactions and improved outcomes between stakeholders (Lacey and Lamont 2014). Stakeholder anxieties leading up to a court case can also be allayed following a judgment, as shown by the Metgasco decision. Before Justice Button's findings were delivered, the Australian Petroleum Production and Exploration Association was concerned that the presence of protesters at a CSG site might mean that genuine community consultation could be construed as ineffective by government decision makers (McCullough Robertson 2015). Although litigation is not necessarily desirable in all cases, or indeed a stress-free exercise for those involved (e.g. Christie 2012), judges do provide crucial feedback on significant public issues – which can lead to improved processes and ultimately justice outcomes.

Following Justice Button's decision, Metgasco entered into compensation negotiations with the New South Wales Government for the expense involved in litigation and economic loss resulting from its halted exploration activities. The New South Wales Government offered Metgasco a A\$25 million settlement/buyback arrangement, in exchange for relinquishing its

three Northern Rivers petroleum exploration licences – including its Rosella site (Metgasco 2015). This offer was presented to Metgasco’s shareholders for a vote in December 2015, with Metgasco’s board of directors unanimous in their support for the settlement offer (Metgasco 2015). The New South Wales Government took the view that the settlement was ‘fair and reasonable’, balancing ‘the interests of NSW taxpayers and Metgasco’s shareholders’ (New South Wales Government 2015). Ultimately, the government’s compensation offer was accepted by Metgasco’s shareholders – who indicated the company would investigate future investment options outside New South Wales (ABC News 2015e). Beyond procedural justice questions and acting as a catalyst for further negotiation between different stakeholders, the courts have also delved into matters of distributive justice and it is to here that this chapter now turns.

### **Distributive justice: APT Petroleum Pipelines Pty Ltd v Western Downs Regional Council**

As noted above in the introduction, support for CSG exists in communities that foresee economic and social benefits from the extraction of this resource. In the case of Australian local governments, opinions are divided as to the relative merits of CSG, with some local government authorities openly adopting an anti-CSG line (e.g. ABC News 2015b) – while others embrace the sector as advantageous to their community (Anonymous 2014). Presented with few legal powers with which to control CSG development, some councils have nonetheless found themselves embroiled in CSG disputes relating to town planning matters, such as a CSG wastewater storage pond (*Golder v Maranoa Regional Council & Ors* [2014] QPEC 68; *Westrex Services Pty Ltd & Anor v Maranoa Regional Council & Anor* [2014] QPEC 30). Yet even in places where there is strong support for the industry, the law can be used to dispute the value of landscapes associated with this resource, as was highlighted in the APT Petroleum Pipelines decision.

Ray Brown, Mayor for the Western Downs Regional Council in south-west Queensland until March 2016, has been prominent in the media as a strong supporter of the CSG industry – earning the nickname ‘the Mayor for Mining’ (Gribbin 2015). In September 2012, the Council resolved to modify their rate categories after adopting a 2012–13 Revenue Statement (a document that established rate codes and categories for rateable land within the Council’s boundaries) in line with section 104 of the Queensland Local Government Act 2009. Their decision impacted upon the company APT Petroleum Pipelines (APT), the operator of the Roma/Brisbane Gas Pipeline. Part of APT’s operation included five gas compressor sites within the boundaries of the Council – infrastructure designed to facilitate the flow of gas to the pipeline. The Council categorised these five compressor sites in a rates notice issued to APT, defining these localities as ‘Petroleum under 400 ha’ – with land in this category intended for gas extraction or processing (or for purposes ancillary or associated with gas extraction or processing, for example, water storage and pipelines). In response, APT formally objected to the rates categorisations the Council had placed upon the five parcels of land relating to the gas compressors. An internal review of the rates decision by a delegate from the Council found no cause for re-categorisation in October 2012.



This became the focus for an appeal to the Queensland Land Court. The question the Court faced was whether these compressor sites were appropriately categorised for rates purposes by the Council.

In court, APT argued that its compression stations were not ‘CSG processing facilities’ as the Council had zoned them. Instead, the company argued they should be zoned under the separate rates category of ‘transport and storage’ – which attracted a lesser fee. The Council countered by arguing that because APT was using the compressor sites for a pipeline that transported gas, it was a use associated with gas extraction and/or processing because the pipeline provided the means of transport of the gas from the extraction and processing locations to gas distributors and users. As an alternative argument, the Council countered that the use of the compressor sites was ancillary to gas extraction and/or processing, because the sites were incidental to and necessarily associated with gas extraction – the fact that APT did not itself extract and/or process the gas at the compressor sites was irrelevant in the Council’s view.

Focusing on the question of whether or not the transportation of gas was ancillary or associated with gas extraction or processing, the Court concluded in March 2014 that APT’s pipeline was a large structure and, as a matter of scale, not something readily thought of as ancillary or associated with gas extraction or processing. The Court accepted APT’s argument that the activities performed at the compressor sites did not involve any refining or purifying of the gas that was supplied for transport by the pipeline. As a consequence, the Land Court found that the five gas compressor sites should be placed within the industrial transport/storage category for rate purposes (*APT Petroleum Pipelines Pty Ltd v Western Downs Regional Council* [2014] QLC 18).

From a distributive justice perspective, this case demonstrates that, even when local governments support CSG development, they may still turn to the law to attempt to secure what they believe to be a reasonable share of the economic benefits arising from the resource. Despite a costs order subsequently being imposed against the Council by the Land Court in August 2014 (*APT Petroleum Pipelines Pty Ltd v Western Downs Regional Council (No. 2)* [2014] QLC 27), there do not appear to be ongoing tensions between the Council and APT as a result of the legal challenge over rates. As Ray Brown later commented:

I don’t think there is going to be any long term broader implications of the court’s decision ... These [CSG] companies have an impact on our region and we simply attempted to rate it accordingly, to cover the cost of using it and the future sterilisation of that area. (Anonymous 2014)

Crucially, the APT judgment considered the distributive justice aspect of CSG in Australia, underscoring the fact that particular rural communities in Queensland and elsewhere have needed to respond to the impacts of CSG, both positive and negative, as a result of a broader state and national energy preference for the industry’s expansion. The wider Australian population stands to benefit from CSG royalties, due to the Crown’s ownership of mineral resources, but this has

not been without cost for some local governments in CSG impacted regions. The manner in which local government authorities such as the Western Downs seek to distribute the burdens and benefits of CSG is an ongoing exercise – provoking questions of equitable treatment by state governments and drawing attention to whether or not local governments are appropriately equipped to bear both the burdens and economic prospects of CSG-driven development. Legislative changes that reduce the ability of New South Wales local governments to participate in planning matters associated with CSG activities are examples of ongoing challenges to local control by state governments (ABC News 2015d). The desire of the Western Downs Regional Council to seek a larger share of the economic benefits arising from CSG, in this case through a levy on the land occupied by CSG-related infrastructure, is therefore symptomatic of larger governance challenges facing Australian local governments in mining regions (e.g. Cheshire et al. 2014).

### **Conclusion**

There has yet to be a ‘flood’ of litigation surrounding CSG in Australia, but from the existing decisions it can be seen that procedural and distributive justice matters have arisen over this contested resource – whether the parties be landholders, social movements, CSG operators, contractors or governments. It can be expected that further judicial determinations will be made as this industry continues to expand, providing litigants with important opportunities to clarify their expectations of the CSG sector and attend to the larger social licence project confronting this industry in Australia. Future litigation may include elements currently missing from the corpus of cases covered above. An obvious example of this being landholder compensation. Although members of the Australian judiciary have been careful to avoid commenting on the merits of CSG in their findings, they are nonetheless powerful actors in this community discussion, with the capacity to demand more from community–company interactions through their rulings. Judicial determinations can draw upon geographical concepts to bring attention to justice processes and outcomes in the context of individual stakeholder disputes, thereby offering an important moderating voice in the ongoing community debate over CSG in Australia. Although uncertainties will remain in this national discussion – particularly given the differences between individual state laws surrounding CSG and their specific political proclivities – judgments from the courts can drive some positive changes to the negotiation dynamic between all parties in the longer term.

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## Chapter 7: Fracturing planners: a scoping study of their role(s) in Australia's coal seam gas debate

This chapter was submitted to *Land Use Policy* in August 2017.

### Abstract

Planners are key actors in Australia's coal seam gas debate at local government, state government and industry levels. Literature on unconventional gas offers suggestions as to how planners should respond to these resources, without investigating the views of planners themselves. This paper builds on recent research into the roles and self-perceptions of planners in the Republic of Ireland by framing these roles as a typology to inform an empirical analysis of this profession's involvement in coal seam gas debates in the Australian States of New South Wales and Queensland. Combining documentary sources, existing literature and interviews with 22 local/state government and industry consultant planners, this paper examines some of the roles played by planners in responding to coal seam gas development in historical and contemporary contexts. In doing so, this paper considers the responses of planners to a politician's characterisation of their profession as 'peacemakers' and examines planners' views on the future challenges and opportunities for coal seam gas in Australia. It also explores their participation in coal seam gas community forums as employees for local and state governments. Detailing data collection challenges and opportunities for future research, this paper highlights the value of professional experts as a means of shedding light on various aspects of land use challenges.

### Introduction

Planners lie at the heart of land use decision making and are consequently often embroiled in contentious societal disputes. Coal seam gas (CSG), also known as coal-bed gas or coal bed methane, is an unconventional fossil fuel and one of a number of contested land uses in Australia. Technological innovation in extraction techniques has transformed this gas, once seen solely as a hazard to be drained for the safety of underground coal miners, into a profitable concern. Following tentative exploration in the late 1970s and 1980s (Scott, 1999), government agencies expressed interest in exploiting CSG for electricity generation from the early 1990s (Enever and Jeffrey, 1991; Queensland Government Department of Minerals and Energy, 1993; Scott, 1993). Since then, CSG has provoked a range of community reactions (Hoare, 1992). Tensions have escalated markedly in the past six years, particularly in the eastern Australian States of New South Wales and Queensland, as industry expands into more heavily populated rural areas traditionally associated with intensive agricultural and pastoral production. This geographical shift led in part to the creation of a national anti-CSG social movement known as Lock the Gate in 2010, an alliance of farmers and environmentalists (Cronshaw and Grafton, 2016). Other aspects of Australia's CSG deliberations include: extensive media commentary, political debate, litigation

(Turton, 2017), and government inquiries (e.g. Northern Territory Government, 2017). Academic literature is accruing around unconventional gas (UG), particularly community perceptions (e.g. Stedman *et al.*, 2012). But little consideration has been given to how professional groups in society interact with these resources and the manner in which that expertise feeds into community debate. Australian planners, in all their diversity – community, strategic, environmental and development assessment, employed in academia, industry, local/state governments – are a profession that merits analysis, given their exposure to a variety of contested landscapes beyond CSG.

This article examines the roles of planners in Australia's CSG controversy in both contemporary and historical contexts, with an emphasis on local government planners in New South Wales and Queensland. With a professional mandate to consider future land use needs, planners are well-placed to offer unique insights into an array of challenges and opportunities resulting from CSG. A planner-centric focus is also pertinent given recent commentary from academics and the American Planning Association arguing that the profession has a strong role to play in energy production matters and a responsibility to engage in never-ending land use debates to promote sustainable communities (Farmer 2014; Kaza and Curtis, 2014). This paper uses mixed qualitative methods (interviews and publicly available documentation) to ask: how do planners see their role(s) in Australia's CSG discussion? Drawing on an empirically-based and theoretically-informed analysis of the self-perceptions of planners in the Republic of Ireland (Fox-Rogers and Murphy, 2016), this paper deploys their findings as a typology of planner roles to present a planner-focused study of Australia's CSG debate. As a scoping exercise, what follows cannot be considered representative of the entire Australian planning profession and their range of opinions on CSG. Nonetheless, investigating the views of planners in this national debate is worthwhile, extending existing analyses of UG planning policies and practices (e.g. Short and Szolucha, *in press*; Connor, 2016; Loh and Osland, 2016) for a better understanding of this resource and the professionals engaged by it.

Beyond protests against planning decisions and development proposals (Shevellar *et al.*, 2015), Australian planners have been criticised by academic and media commentators for their responses to CSG development (Nichols, 2016; Ennis *et al.*, 2013). Others offer suggestions on how to achieve a social licence for CSG (Lai *et al.*, 2017). This is replicated internationally in recommendations addressed to planners to cope with the socioeconomic impacts of UG (Measham *et al.*, 2016; Hall, 2015; Jacquet and Kay, 2014). But Australian planners themselves remain largely sidelined, appearing only sporadically in professional journals, conference proceedings and unpublished planning dissertations (O'Connor, 2013; Rivett, 2012; Honey, 2012). In light of calls for greater attention to rural regional planning (Morrison *et al.*, 2015), this paper attempts to redress this relative silence.

Planners are present in several strands of the UG literature and deserve greater scrutiny, as do other embedded professionals such as lawyers (Turton, 2015b), valuers (New South Wales



Government Land and Property Information, 2014) and auditors (Victorian Auditor-General, 2015). Planners have also yielded insights in other arenas, including water governance (Morgan and Osborne, 2016) and wind farms (Fast and Mabee, 2015). Before delving into planner involvement in Australian CSG issues, existing literature is surveyed. The content of interview questions and data collection challenges are then noted. The framework devised by Fox-Rogers and Murphy (2016) then follows, before considering planner viewpoints. Targeting professions connected with UG is one way of understanding community and institutional change arising from its exploitation (Schafft *et al.*, 2014) and planners have contributed to CSG discussions for some years – as evidenced by the literature.

### **Placing planners in the CSG literature**

Numerous studies examining community attitudes towards UG have been published (e.g. Williams *et al.*, 2017; Bec *et al.*, 2016; Whitmarsh, *et al.*, 2015; Stedman *et al.*, 2012), with some planners assisting this research (Poole and Hudgins, 2014; Jacquet, 2012). Although visible in some North American scholarship (Crowe, *et al.*, 2015; Evensen, 2015; Rawlins, 2014; Powers, 2011), planners are often located within interviewee samples encompassing other professions (Evensen and Stedman, in press; Osland, 2015; Larson *et al.*, 2014; New, 2014). In Australia, planners are mentioned in various CSG contexts. For example, local governments may refer to planner expertise when refusing a permit for an anti-CSG protest camp on public health grounds (Turton, 2015a). Others situate planners within the larger enterprise of governing resource industry developments in Australia, described as a ‘wicked problem’ – making it difficult ‘for planners, citizens, and others to understand much less arrive at effective and agreed strategies to address the issues’ (Uhlmann *et al.*, 2014: 189). The profession features in Australian commentary on the transformation of regions into sites of extractive industry: ‘These new sources of wealth are commonly seen by markets and regional planners as employment generators and income boosters’ (Fleming and Measham, 2015: 79). This is consistent with remarks from some interviewees and international research (Silva and Crowe, 2015).

Previous Australian research has captured CSG viewpoints from some planners, primarily in the Western Downs region of Queensland (Foale-Banks, 2013; Honey, 2012). This is unsurprising given its status as a site of significant CSG extraction. Their investigations examined ‘best practice’ regional planning and governance strategies to respond to resource sector impacts in rural communities, interviewing various stakeholders including planners (Foale-Banks, 2013; Honey, 2012; Tanwan, 2012). All three studies were designed for the limited resources and timeframe of a student dissertation, with planner insights understandably limited. Nonetheless, their findings included: the challenges of retaining a region’s identity when faced with influxes of temporary workforces (Foale-Banks, 2013), pressures on local government planners to process development applications during boom periods with associated high staff turnover (Honey, 2012), and the difficulties of implementing economic diversification strategies in single industry towns (Tanwan, 2012). Recent research involving New South Wales local government planners makes

a salient jurisdictional point regarding the related coal sector (Black, 2011), one Liverpool Plains planner indicating an awareness of farmer anxieties about coal and a recognition that the regulation of this resource lay with the state government and was therefore ‘out of Council’s control’ (McFarland, 2016: 137). This sentiment was repeated by interviewees in this research, however some emphasised that local government has an important community advocacy role in lobbying state governments to alter CSG regulations.

Planners are not passive observers of changes to their regulatory environment (Ruming, 2011) and their voices are present in CSG discussions, whether as an employee of a local government authority reaffirming an anti-CSG position in the Australian State of Victoria (Duncan-Jones, 2012); in their capacity as a consultant environmental planner calling for appropriate planning to assist CSG’s social licence (Robinson, 2014); or in a former state government planner’s contention that industry should embrace government regulation to confer legitimacy on CSG projects (Edwards, 2013). Some planners have interviewed members of the profession for their views on CSG (Mullins, 2012, 2011a) and critiqued its regulation, from a specific policy such as strategic regional land use plans in New South Wales (Mitchell, 2013), to larger planning uncertainties in resource-based regions (Mayere and Donehue, 2014; Mullins, 2011b). Planners have entered Australia’s CSG debate from several vantage points. This study attempts to consolidate this fragmentary literature and illustrate a range of planner insights on CSG issues from documentary sources, interviews and the wider literature.

### **Methods**

This paper adopts a triangulated approach to data collection, using interviews to supplement documentary sources and existing research. Semi-structured interviews were conducted in accordance with university ethical protocols ( $n = 22$ : 5 state government, 3 consultant, 14 local government) and are used in conjunction with documentary sources to draw out insights into the profession’s engagement with CSG across time and space. The interviews constitute a purposive sample and were recorded with the consent of participants: 15 of these were phone interviews with seven conducted face-to-face. Interviews were transcribed verbatim by the researcher, then returned to interviewees to check for accuracy. The duration of interviews varied from 30 minutes to three hours, generating between six and 53 transcript pages. Interview questions focused on the involvement of planners in CSG community forums, self-perceptions of their role in CSG issues (at local/state government and consultancy levels) and their efforts to keep the community informed of change as a result of CSG development. All interviews, apart from one phone interview and two face-to-face interviews, were conducted one-on-one.

Most of those who agreed to be interviewed did so only on the condition of anonymity. Common identifiers, including name and employer, were not recorded – unless an interviewee agreed to be identified as such. All interviewees spoke as individuals and their statements do not constitute the official policy of local/state governments or consultancy companies. Nonetheless,

interviewee opinions have clearly been informed to some extent by particular roles and experiences with CSG in various tiers of government and the private sector.

The snowball sampling method was used to generate informants. As this risks a concentration of similarly-held biases among interviewees (Dunn, 2005), planners were sourced through publicly available documentation, a planner academic who emailed information about the research to members of their professional network (a prospective recipient target of 120 planners, including members of the profession's peak representative body, the Planning Institute of Australia), and suggestions from government and non-government organisations. Publicly accessible sources were used to frame questions and guide targeted contact with the planning sections of relevant local and state government authorities in particular regions of New South Wales and Queensland. Finally, a search of Australian planning firms was performed for possible informants, since private sector planners advertise their UG expertise internationally (e.g. Stephenson Halliday, 2016).

Some CSG articles identified the employers of planners (e.g. ABC News, 2015, 2014; Duncan-Jones, 2012) and contact was made with these organisations to set up possible interviews with either the individual cited or planner colleagues. It is recognised that those employed as planners may not necessarily have formal planning qualifications, with various educational and professional backgrounds revealed in interviews, ranging from law to engineering, geography, economics and environmental science. Therefore, criteria for inclusion in interviews consisted of involvement in CSG issues (approached broadly in view of the CSG supply chain and development stages) and employment in planning roles within an organisation. These approaches met with mixed results, reflecting specific UG research challenges and general difficulties with academic access to Australian local governments.

Commenting on interviews with community leaders and perceptions of UG in the Illinois Basin of the United States, sociologists emphasised the lack of response from local government officials: 'The fact that we reached only eighteen individuals...suggests the lack of trust that exists for many in academia: perhaps because of the research subject itself' (Ceresola and Crowe, 2015: 68). Wariness of academics is not limited to UG, however, with a qualitative methodological reflection highlighting 'a low level of respect amongst local government personnel for academics and academic work' as a key factor in the obstruction of researcher access to Australian local government staff and elected members (Pini and Haslam McKenzie, 2007: 32). This distrust may have its origins in a historical lack of academic interest in local government issues, increased demands on the time and resources of local governments in Australia generally, and fear of external scrutiny (Pini and Haslam McKenzie, 2007). As CSG is contentious and subject to ongoing research in several Australian communities, interviewee fatigue may be relevant. The researcher received no response to repeated attempts at contact in many cases, but explanations for refusing to participate included: a lack of staff resources/time to assist, staff turnover (a challenge underlined in Keough's (2015) Canadian boomtown research), concerns around the

subject matter/political sensitivities and a lack of contemporary knowledge of CSG – although the researcher indicated an interest in contemporary and historical CSG experiences when approaching interviewees. Interviews were conducted intermittently between May 2016 and January 2017, demanding significant negotiation time.

Few state government planners agreed to be interviewed. Because state governments wield the majority of legal authority over CSG developments in Australia (e.g. Mayere and Donehue, 2014), their small representation is perhaps not surprising and represents a significant research gap. Similarly, some consultant planners who perform work for the CSG industry may have concluded that an interview with a university researcher presented risks due to ongoing CSG media coverage – possibly presuming a researcher bias against the industry. At least one planner's controversial involvement in a gas development has attracted claims of a conflict of interest in the national media (Burrell, 2013).

By contrast, some planners assisted the researcher, taking time away from looming deadlines to answer questions, forwarding on relevant material, suggesting other informants and arranging introductions to colleagues. Likewise, some non-government organisations contacted by the researcher provided the names of possible interviewees and documents. Additionally, a researcher visit to the Queensland Isaac Regional Council town of Moranbah from 31 October to 4 November 2016 was made possible, in part, because of the provision of Council accommodation at no cost and arranged by staff at the request of the Council's Director of Planning, Environment and Community Services, Scott Riley (Email from Isaac Regional Council, October 2016). Council planners also provided a tour of CSG-related infrastructure around the community.

### **Planner perspectives**

#### *Theoretical context, planner roles and interview questions*

In research on planners' self-perceptions of their role in the Greater Dublin Area, Fox-Rogers and Murphy (2016) used four theoretical perspectives to inform their qualitative interviews with 20 planners: pluralism, managerialism, reformism and neoliberalism. A pluralist outlook on the planner's role portrays the state as the guardian of the 'public interest', with responsibility for overseeing disputes between pressure groups – where the 'planner is viewed largely as a mediator' (Fox-Rogers and Murphy, 2016: 75). By contrast, managerialism stresses the importance of bureaucratic power and technocratic expertise – with planners understood as specialists providing advice within legal frameworks shaped by the interests of the state. A reformist view of planners treats the profession as advocates who seek progressive change for marginalised societal interests or the attainment of community-wide benefits, within the constraints of their need 'to support the interests of private capital' (Fox-Rogers and Murphy, 2016: 77). Finally, neoliberalist conceptions of planners emphasise their role as agents of the state, who are 'compelled to become increasingly entrepreneurial and facilitative of private development interests', against a background of New Public Management reforms (Fox-Rogers

and Murphy, 2016: 78). The authors acknowledge criticism of each of these perspectives in the literature.

The intention of this paper is not to prove or disprove the conclusions of Fox-Rogers and Murphy (2016), but to instead use their study as a typology of planner roles and a convenient structuring device for this CSG analysis. From the documentary sources and interviews, it is apparent that although some planners clearly fit into one category or another, others wear multiple hats as mediators (pluralism), administrators (managerialism), liaison/facilitators (pluralism), professional advisers/experts (managerialism), advocates (reformism), ‘social gatekeeper[s]’ (managerialism) and ‘facilitator[s]’ of development (neoliberalism) (Fox-Rogers and Murphy, 2016: 84). As one planner declared: ‘We would be category H, all of the above’ (Interview with Scott Riley, Isaac Regional Council).

Fox-Rogers and Murphy (2016) coded interview transcripts to determine the extent to which planners’ self-perceptions were aligned to the above theoretical viewpoints. Their framework is not without limits to this study, but nonetheless guided an interview question concerning comments made by the then New South Wales Minister for Planning, Robert Stokes, who vacated this position in January 2017 (Parliament of New South Wales, 2017). Stokes, a former lawyer with expertise in the State’s environmental and planning laws (Stokes, 2017), assumed responsibility for the Planning portfolio in April 2015 and a month later told journalists that: ‘Planners need to be peacemakers because the nature of planning is it’s about contested visions of the future’ (McKenny and Hannam, 2015: 10).

Repurposing Stokes’ statement, interviewees were asked whether they believed the then Minister’s remarks were a reasonable comment on their professional role in the context of CSG. Other interview questions sought to identify the following from a planner’s perspective: key challenges and opportunities for CSG in Australia, what factors they believed drove planning policy around CSG, the value of community forums for communicating CSG policy to the public, the use of information from other jurisdictions/planners when crafting responses to CSG, available mechanisms for controlling CSG development, and the extent of collaboration between planners at local/state government levels and local government associations. Interviewee experience, jurisdictional and professional context dictated that certain topics were explored in some interviews and not others.

#### *Planners as peacemakers?*

On Stokes’ contention that planners should endeavour to be peacekeepers, views were mixed. One Queensland planner agreed with his general statement at a community level, appearing to embrace community advocacy, technical and facilitative aspects of a planner’s role (Fox-Rogers and Murphy, 2016):

[P]lanners are in a unique position of being able to represent the community...in terms of development of land in [the] short term and the long term. We’re also able to look at the differing land uses...and we have the

technical ability to...talk with a range of different experts in the area...be they engineers, be they demographers, be they environmentalists...I would suggest that we are in a unique position to be able to resolve a lot of conflicts that other people typically just get locked down in (Queensland local government planner interviewee #1).

Others disagreed with the characterisation of planners as peacemakers, seemingly favouring a technocratic interpretation of the planner's role:

I think, with or without CSG, planners are trying to make the best fit with what the land provides...From my perspective, I don't see myself as a peacemaker...It's [about] being able to clarify exactly what the rules are and then...putting all that information up to...the elected council, and saying 'these are the rules, you go this way and this is the potential outcome and these are the risks, or alternatively go the other way and these are the risks' and then let them make the decision (Interview with Ian Turnbull, Cessnock City Council).

Would I consider myself as a peacemaker? I don't...I wouldn't use the word peacemaker. I think that Council, our role really as Council officers is to work for the community and to work with our elected Council. I think in terms of this space, I'd say advocacy and support are our biggest roles (New South Wales local government planner interviewee #4).

Another viewed mining as an area that required a firm stance from government beyond attempts at peacemaking:

There's a lot of planning activities and planning sectors where peacemaking is important because everyone's just got a view on houses being built next door or whatever, but where the conflict's so significant like mining you need to make some harder decisions (State Government Planner interviewee #1)

These comments suggest that planners identify with a variety of roles as circumstances demand and it is clear that not all interviewees agreed with Stokes' peacemaker descriptor. One informant reflected that a planner's opinion on Stokes' remarks 'really depends on...your planning education':

What I might call two views. One is the narrow statutory view of planning, it's about assessing applications to things within the context of policy and that's it...[T]hen there's the countervailing view to which I obviously subscribe, which is to see it as a broader endeavour of problem-solving issues which have a spatial component (New South Wales local government planner interviewee #6).

The impact of planning education on planners' self-perceptions of their role is referred to briefly by Fox-Rogers and Murphy (2016) and warrants attention in future research. Other planner roles identified by these authors are revealed in responses to a question on the future prospects of CSG.

#### *Challenges and opportunities for CSG*

Commentators recognise that planners inevitably express their views within a legal and socio-political context (Versteeg and Hajer, 2010) and opinions may vary as a result. For example, when commenting on future challenges and opportunities for CSG in New South Wales in August 2016, one observed that:

The industry really is pretty dead...I guess that's the challenge for industry...finding areas where they can expand, where the planners find it acceptable because the resource is only where it is...you can't move the gas resource...But there tends to be either urban or agricultural or biodiversity concerns... I don't think it's got a great future in New South Wales, it might get overtaken by other energy resources...I can't see it, at least in the next 10 years...by which time everything else [alternative energy sources] is going to be cheaper anyway (State Government Planner interviewee #1).

This statement was made in the aftermath of an industry retreat from New South Wales following community protests, legal challenges, licence buybacks and compensation payments to industry (Turton, 2017; Connor, 2016). But in the Bowen Basin in central Queensland, a region with a well-established coal industry (Galligan, 1989) and a CSG exploration site since the late 1970s (Scott, 1993), a local government planner took a different view:

The biggest opportunity for CSG is probably no different to mining, it's how we can leverage technology to generate a better outcome...[Our Bowen Basin derived] CSG is not easy CSG [to extract] because it's in multiple seams and it's got a few challenges with it. But at the same time it is certainly a resource that's being exploited and will grow in prominence. Particularly if carbon capture and storage [technology]...doesn't come to fruition (Interview with Scott Riley, Isaac Regional Council).

Another informant emphasised the benefits of CSG and its likely longevity at a local level:

The gas industry's here to stay...a 40, 50 year lifespan. It's now part of the new norm of our community and from that new shops open...new businesses, we've seen people move into the region in response to that. So, it may not be what it was three years ago, but we're certainly in a better space than what we were before it came (Queensland local government planner interview #4).

To some extent, these latter viewpoints support existing conceptions of planners in the UG literature (as discussed above), while also giving credence to the 'facilitator of development' (neoliberalism) aspect of a planner's role (Fox-Roger and Murphy, 2016). This 'facilitator' perspective is not a new phenomenon and while much of what planners do can be described as futuristic, the profession's engagement with CSG has a history. It is helpful to reflect upon this, as it provides an insight into the involvement of state government planners in CSG, partially supplementing their small interviewee presence in this research. As pointed out in the Introduction, CSG was once regarded purely as a danger for underground coal miners, but more recently has taken on dual identities, as both a 'threat, in the case of coal mine operators...[and] an opportunity, in the case of coalbed methane producers' (Black, 2011: 13). An historical episode involving coal, methane drainage and urban growth south-west of Sydney in the early 1990s demonstrates this double-sided nature and the land use challenges posed by the emergent sector.

By the early 1990s, Sydney's population was expanding into rural communities south-west of the state capital and one parliamentarian declared that at least two of these (Camden and Wollondilly) had 'virtually doubled in size since 1973 to approximately 25 000 and 31 000 respectively' (Kernohan, 1991: 2293). At the same time, the New South Wales Electricity Commission expressed interest in exploiting CSG from the Sydney Basin for electricity

generation (New South Wales Department of Mineral Resources and Office of Energy, 1992; Enever and Jeffrey, 1991). Legislative proposals to regulate 'seam gas drainage' dated back almost a decade earlier (Kininmonth and Mould, 1982: 353). In recognition of its national importance, the Commonwealth Scientific and Industrial Research Organisation likewise kept a keen eye over technological advances as part of its objective of 'fostering the infant coal bed methane industry in Australia' by various means (Enever and Jeffrey, 1991: 61). Macarthur South, south-west of Sydney and south of Campbelltown is located in the Southern Coalfields region of the state and in expectation of Sydney's population growth was touted as a future urban sector by the early 1990s. Describing the challenges of developing the area in 1991, a planner in the New South Wales Department of Planning observed that:

[Accommodating] population growth in the short to medium term is counterbalanced by...the longer term interests of the coal industry and those associated with the draining of gas from the coal seams and surrounding strata. Associated with the long term interests of the coal industry are a number of...environmental constraints, conflicting land use requirements and differing time scales that need to be dealt with in plans for future urban development. One of the philosophies for the planning exercise for Macarthur South is the development of a strategy that will allow for the extraction of coal and coal seam gas in conjunction with plans for future urban development. Coal gas drainage from underground coal mines is...necessary to the future of the coal industry in the area [and] there may be a potential for commercial exploitation and utilisation of coal gas (Sullivan, 1991: 117).

Sullivan alluded to a New South Wales Department of Minerals and Energy assessment of CSG resources commenced in October 1990: '[To] undertake an initial study of...prospective technologies and applications, and research and development priorities' (New South Wales Department of Mineral Resources and Office of Energy, 1992: 7). To this end, a methane drainage taskforce was formed to consult with coal and gas companies, regulatory agencies (including the Department of Planning), the Queensland Department of Resource Industries, the Queensland Electricity Commission and local government representatives. The coal industry had not yet established itself within Macarthur South, but saw the area as important for its future coking coal requirements. Industry representatives on the taskforce indicated that their operations in Macarthur South would increasingly require the removal of methane as their activities reached greater depths, with surface drainage technologies needed to control methane emissions.

The coal industry's preference was for this to occur in the area before urban development, as an essential preliminary activity to preserve the supply of coking coal for the Australia's steel industry and to enable CSG extraction as a resource in its own right: 'The amount of energy...could potentially...meet New South Wales' gas requirements for a period in excess of one year' (New South Wales Department of Mineral Resources and Office of Energy, 1992: 53). Ultimately, urbanisation won out over coal and gas development in Macarthur South, as the 'necessary technology...[for CSG was] still to be proven in New South Wales' (New South Wales Department of Mineral Resources and Office of Energy, 1992: 114). But the planning challenges



brought to light by the taskforce did not dampen the enthusiasm of the New South Wales government, who viewed CSG even in 1992 as a potentially sizeable industry and advantageous to state gas supplies.

This historical snapshot highlights challenges faced by state government planners when addressing diverse land use aspirations and shifting social, economic and environmental demands over time. The above remarks also suggest an effort to approach these difficulties in a holistic fashion. It bears similarities with the CSG views of one state government planner, with the added observation of present-day community anxieties and stakeholder uncertainty:

[In assessing] the performance of the [CSG] industry, the environment is one of three factors that you're taking into consideration. As important as it is...we're not going to shut down an entire industry because of a perceived risk. If the risk can be managed, the industry can come in and can benefit that area. I think that that's a good thing, because it...has all of those [economic and social] spinoffs for towns...In anything to do with CSG, the underlying...problem...has been a lack of certainty...I think any planning response needs to improve certainty not just for communities but investors as well, so they can go ok this a no-go zone, but over here is a mixed use zone for agriculture and gas. So they know where they can go...If you can get more certainty around that, I think a lot of the angst would have gone out of this (Interview with Andrew Foley, Queensland state government planner).

This is but one perspective from a planner in one agency and CSG opinions will likely differ across different government departments (local and state). The same is true of planners and their diverse responsibilities within an organisation, as one explained:

[M]y current role...covers...three portfolios. The first is economic and community development...[T]hat's where I'm responsible overall for Council's endeavours to attract new industry...[Then] there's planning and building services, which covers strategic and statutory planning as well as building services...caravan parks etc...[T]he third area is environment and compliance...So yes, these areas sometimes have different objectives...and interestingly enough [with] coal seam gas...there's a prima facie tension between an industry that could potentially be of benefit to the shire and the [Council's] political position which says oppose it with everything possible (New South Wales local government planner interviewee #6).

The notion of planners as community advocates (reformism) and professional experts/advisers (managerialism) (Fox-Rogers and Murphy, 2016), also came through in interviews for this study. Community events were one means by which these aspects of a planner's role were displayed.

#### *Planners and community/local/state government meetings*

As noted in the Methods section, some interviewees were located from media coverage of CSG issues and included reportage of public community forums where planners presented CSG policy information (e.g. ABC News, 2015; Cessnock City Council, 2015). Community forums have drawn the attention of UG researchers (Loder, 2016; Turton, 2015b) and serve as stakeholder engagement exercises (e.g. Wollondilly Shire Council, 2013). Planners have been involved as

audience members and presenters, whether at industry-run events in the United States (Crowe *et al.*, 2015) or occasions where planners met with the general public as representatives of Australian local and state governments (e.g. Turnbull, 2015; Turnbull, 2012).

Interviewees were asked about their impressions of community forums as a tool for conveying CSG policy information. Planners who had presented on CSG issues were generally positive about the value of the exercise for gauging community concern, as recounted by one New South Wales planner:

I think it was a helpful exercise in providing an opportunity for everyone to have their say in relation to the issue. We probably had 90 people attend...and we thought you know there was a whole lot of risk associated with people turning up with placards...[but] it ended up being the most peaceful presentation...I think we had enough information from the community, we knew where the community stood in relation to it and...Council had been lobbying the State Government (Interview with Ian Turnbull, Cessnock City Council).

Recalling community meetings they attended in their capacity as a resident, another local government planner believed that:

Community forums were reasonably well-attended...We just had speakers from the CSG industry...we had a few community people speaking...[T]hey put their view, a couple of researchers put their view and it was just conveying the information really....It's a way of Council also hearing the concerns of the community and [it] assist[s] in making a position as well in regard to industry (New South Wales local government planner interviewee #1).

Such positive viewpoints are counterbalanced by the challenges of conducting public forums in an environment fraught with community tension – preventing planners from effectively relaying details about CSG. An example of this arose in December 2012 when the then New South Wales Minister for Planning, Brad Hazzard, the state Member of Parliament, Thomas George and Planning Department officials attended a community meeting in the northern New South Wales town of Lismore. Although invited by the Lismore City Council to speak to roughly 500 people about CSG developments in the Northern Rivers region, the social movement Lock the Gate intended for the event to become raucous ‘in order to demonstrate how unheard they, themselves felt’ (Luke, 2016: 111). Audio recording confirms this, with the Minister and planners unable to be heard over the shouting of audience members (Turnbull, 2012). Politicians were spat on and Hazzard indicated he would not place public servants in a similar situation again. The then Mayor of Lismore, Jenny Dowell – who had instigated the meeting – reflected that many in the community ‘did not consider this...the finest hour of the social movement’ (Luke, 2016: 111). Reflecting on CSG community forums in New South Wales, one state government planner observed:

It was more of a listening exercise on our part. We were presenting information, but ultimately we knew that the community in these areas were quite angry and having a visibility...not trying to hide behind the front of broad government...to go out and listen to people...I don't know that they

were hugely effective, because when people are that angry they just want to have their yell and that's fine but it doesn't lead to a productive outcome...[A]t the time I don't know if there was anything else we could have done (State Government Planner interviewee #4).

Whether well-received or not, planners appear to regard sharing information about CSG with the community as an important activity. Although some local government planners have participated in forums, others have avoided presenting at community events connected with the industry as part of a general direction from their employer:

From a Council perspective, we have thus far declined to give a point of view really [at community events], because it's so contentious, I think. We can't be seen to be on one side or the other really at this point in time (New South Wales Local Government Planner interviewee #3)

Nonetheless, they acknowledged that numerous information sessions had been conducted by at least one CSG company in their community. Notably, not all local government authorities in Australia have adopted a neutral stance on CSG, with some openly expressing their anti-CSG position (e.g. Camden Council, 2013), even in regions where there are no known CSG reserves (Anonymous, 2014; Egan and Sewell, 2014). Lock the Gate has also been active in persuading local governments to become 'CSG free' in formal council resolutions. More generally, concerns around the environmental implications of CSG for community livelihoods were raised in interviews and are relevant to council opposition in some localities.

Some interviewees were engaged in ongoing formal and informal CSG discussions at local and state government levels – in common with their Canadian counterparts (McKinley, 2015). Local government planners can also learn of CSG proposals by chance at meetings between local and state government representatives. For example, one Mareeba Shire Council planner in Far North Queensland recalled that in 2014 they attended a Council meeting in which representatives from the Queensland Department of Natural Resources and Mines discussed the general subject of CSG and potential exploration at Mount Mulligan:

I came in whilst it was underway...Just happened to be I had something else on after and walked in...There could have been other discussions [with Council], but I certainly didn't have any direct discussions [with the Department]... [Their presentation] was more of a state-wide approach to coal seam gas at the time...[but] it was mentioned that this Mount Mulligan proposal was around (Interview with Mareeba Shire Council Planner #2).

An application for an Authority to Prospect for CSG near Mount Mulligan was received by the Department from the Mantle Mining Corporation in 2014 and the proponent surrendered their exploration permit in March 2015 (Falvo, 2015). The application caused community unease prior to Mantle Mining's withdrawal, partly because of the mountain's indigenous and non-indigenous cultural heritage values. The mountain is famous for both archaeological evidence of human habitation dating back 37 000 years and as the scene of Queensland's worst land disaster – a coal dust explosion in 1921 that caused the deaths of all 75 coal miners underground at the time (Turton, 2015a; Turton, 2014). In a history of the disaster and town updated most recently in

2013, Peter Bell concludes with the epilogue that since 1991 the mountain has been owned by indigenous groups and leased to the State as a national park (Bell, 2013), but fails to mention that the Mount Mulligan Basin was one of several sedimentary basins being examined for CSG by 1993 (Queensland Government Department of Minerals and Energy, 1993).

Mareeba Shire Council interviewees were unaware of any interest in CSG at Mount Mulligan before 2014, but indicated that it seemed an unlikely location, due to remoteness from ports and limited infrastructure: a Council-maintained road considered low-use for grading purposes (Interview with Mareeba Shire Council Planner #1; Interview with Mareeba Shire Council Planner #2). This may explain why local government planners were unaware of earlier exploration. In any case, economic aspirations for the area appear to be based upon tourism, with the announcement of a ‘boutique resort’ development in 2015 (Keegan, 2015: 1) consisting of six cabins and a nearby heliport for guest transportation (Interview with Mareeba Shire Council Planner #1). The challenges and opportunities of CSG will continue to necessitate ongoing dialogue between governments and communities, with planners contributing to discussions, whether in a professional context for government or industry, or as a resident of a given community. Although beyond the scope of this paper, future research could explore the nature of personal-professional understandings of this resource.

### **Conclusion**

Planners are ever-present figures in the CSG landscape. This paper has identified ways in which planners inform Australia’s CSG debate, focussing on self-perceptions of their roles in government, industry and the community, community forums and historical involvement with methane drainage. Using research findings concerning the self-perceptions of planners from Fox-Rogers and Murphy (2016) as a typology of roles, this paper has showcased some of the ways in which planners understand their part in navigating this controversial land use, from the technical expert, to the social gatekeeper, facilitator of development, community advocate and beyond. Importantly, it is clear that many planners adopt multiple roles in addressing stakeholder concerns arising from CSG and are not without public and private opinions as to the future challenges and opportunities of this resource in Australia. Their peacemaker role in CSG disputes is debateable, but planners are certainly thrust into arguments between land users more generally and can at the very least facilitate and inform debates between stakeholders, if not necessarily resolve them.

As noted above in the Methods section, securing interviews with consultant planners for the CSG industry and those employed by state governments is difficult for various reasons, however their perspectives would assist in presenting a fuller picture of the planning profession’s involvement in CSG matters. The opinions of key professionals linked to CSG, such as planners, valuers, auditors and lawyers, can illuminate this contentious land use dispute through discipline-specific ways of seeing the world, complementing community-level research. It is hoped that this study will encourage greater use of their unique insights in future research.

## Acknowledgements

I wish to thank Professor Stephen Dovers and Dr Thomas Measham for their comments on this paper. I am grateful to all interviewees for their time and candour and thank Scott Riley, Manus Basson and Nicole Hartney (Isaac Regional Council) especially for their assistance in Moranbah. Interviews were conducted with the approval of the Australian National University Human Research Ethics Committee, protocol 2016/052.

## Funding

This research was funded by an Australian Government Australian Postgraduate Award and a Supplementary Scholarship from the Fenner School of Environment and Society, Australian National University.

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## Conclusion

This thesis has considered Australia's ongoing coal seam gas (CSG) discussion through a number of lenses in order to answer the overarching research question set out in chapter one: how can environmental history, legal geography, procedural and distributive justice, and profession-specific insights from lawyers, judges and planners, shed light upon this controversial resource? To address this, the thesis considered Australia's CSG debate from a number of standpoints: environmental history to legal geography, distributive and procedural justice, and the perspectives of key professionals – namely lawyers and planners. It has shown that CSG can be understood in numerous ways: an environmental threat to be halted by anti-CSG groups, a risk to be managed by coal miners, an economic opportunity by the CSG industry and by parts of local communities, and a potential transition fuel to a carbon-constrained future by governments. There is a tendency by some media commentators and the authors of some popular CSG texts to treat this national controversy as purely one of contests between CSG supporters and opponents over land, water, food and energy security. While this is partly true, it is an interpretation that neglects the history of the CSG industry, its connections to the coal industry, commonalities with earlier attempts at coexistence between agricultural and mining interests, the interplay between space, CSG and the law, and the insights of key, implicated professionals.

In addressing the research questions posed in the Introduction, this thesis has highlighted the value of examining the following: past experiments with land use coexistence to better understand contemporary CSG disputes; the potential utility of legal geography as a means of articulating the range of relationships and spaces created by CSG; the impact and limits of judicial determinations upon specific CSG disputes and their part in navigating the distributive and procedural justice issues arising from this industry; and the multiple roles performed by planners navigating the challenges and opportunities of CSG at local and state government levels. Ultimately this thesis, beyond the chapter-specific findings, provokes questions about the use of history to reach better understandings of seemingly 'new' industries, while also showcasing how legal geography might be employed to investigate the legal-spatial dynamics of a sector that – despite retreats in Victoria and New South Wales in recent years – is unlikely to disappear soon. Perspectives from lawyers, judges and planners also enable a range of issues to be touched upon, from local government interactions with CSG infrastructure, to the value of community CSG forums and the nature of research partnerships between government, universities and CSG companies.

Research activity is of course a central feature of CSG, both in terms of its historical development and its future prospects. Notwithstanding the controversy that CSG has generated in Australia in recent years, it is reasonable to assume that just as technologies evolved to enable the economic extraction of CSG, mining technologies will continue to improve and perhaps permit the development of not only a shale gas industry in Australia (as briefly noted in the Thesis Contextual Statement), but potentially also tight gas. Would such developments lead to a similar

CSG controversy? It is conceivable that increased societal acceptance of CSG could make the achievement of a 'social licence' an easier task for an as-yet-untried extractive industry. Yet, equally, it seems unlikely that the challenges created by increased proximity between land uses would disappear entirely. It should also be recognised that the world's sub-surface is already being used extensively for many purposes, including unconventional gas – a trend that can only be expected to continue as technologies evolve. Australia's energy choices, at least for the moment, are inclusive of CSG and there would appear to be scope for not only a more detailed history of the industry, but also a recognition that CSG's societal impacts extend in a variety of directions, both along the supply chain and across numerous professions and physical spaces. Above all, this thesis has demonstrated that community case studies of CSG, while valuable, tell only part of Australia's CSG saga – which can be enlivened by tools from legal geography, environmental history, distributive and procedural justice and attention to those connected professionally with land use challenges. It is an approach that could be adapted to investigate other contentious arenas, such as wind farms, solar power and urban planning.

A research approach that involves speaking with key professionals on a controversial topic does have limits, however. As should be clear from the above chapters and their methodological discussions, this thesis has also laboured under considerable research constraints – particularly a lack of access to interviewees and documentation. The researcher has relied heavily in places on media coverage and other materials in the public domain to reveal various findings, and this thesis could have benefited from more interviews with industry consultant planners, state government planners, and lawyers on all sides of CSG disputes. A significant amount of time was spent attempting to secure consent from potential interviewees, however this was only partially successful. It is apparent that these challenges are not unique to CSG social science research and it is likely that this will be an ongoing challenge in this field. Extensive use of documentary sources is likewise fraught with challenges, whether this be risks of bias, insufficient detail or a lack of supporting evidence for the claims made by journalists themselves and their sources.

This thesis has evolved over time and as highlighted in the methods section of chapter two, is a demonstration of the ways in which Australia's CSG debate can be explored. Although a variety of approaches and methods were used by the researcher in the course of producing this thesis – environmental history, legal geography, distributive and procedural justice, and finally planner perspectives – ultimately this thesis has investigated aspects of Australia's CSG debate, which is fundamentally about stakeholder interactions, diverse interests and a controversial energy source. In taking an interdisciplinary approach to the topic, each discipline and research approach has allowed the researcher to interrogate CSG and its impacts (positive and negative) from a number of angles. Although the researcher cannot claim to have grasped the full complexity of Australia's CSG debate, this thesis has shown that it can and should be examined through temporal, spatial, legal and profession-specific lenses – to grapple with a resource whose physical presence conjures up a raft of stakeholder responses.

Although this thesis has managed to shed light upon some aspects of Australia's CSG debate that have hitherto received only scant attention, it is by no means the final word. Many opportunities exist to enrich both the unconventional gas and legal geography literatures using CSG as a case study, though this potential is not without research challenges.

### **Future research**

Although it is natural for CSG academic literature to concentrate on particular facets of this resource, especially its environmental, social, economic and legal aspects, the industry engages a wide range of stakeholders and professions, from engineers to geologists, planners, lawyers, auditors and valuers. Research along this line of inquiry is not without challenges, but it is clear that focusing on professions associated with CSG represents a possible pathway for assessing CSG's societal and institutional impacts. It may also be used to temper and contextualise a land use debate which, for all the attention it has received, remains poorly understood on many fronts. A profession-focused analysis could also be fruitful for non-CSG researchers – as many of the professionals referred to in this thesis are engaged across multiple natural resource management arenas. Further research may reveal more information about those Australian industries that use CSG in their operations. This could be carried out as either a standalone study, or to understand broader stakeholder responses to the current claims of gas shortages facing Australia – as alluded to in the Thesis Contextual Statement.

If current commentary surrounding CSG is any guide, it seems likely this resource will continue to be part of any energy mix for Australia for some time. At the time of writing, the outcome of an ongoing government inquiry into the impacts of CSG in the Northern Territory could prove fruitful for legal geographers wishing to investigate Indigenous land use agreements between traditional owners and CSG operators further – given the Territory's land tenure arrangements and early stage of CSG development. The Commonwealth's engagement in environmental protection issues connected to CSG is another point of possible future exploration for a legal geography perspective on this resource – a question not taken up in this thesis, but nonetheless a valid one for future consideration by researchers. The potential for CSG-themed climate change litigation is likewise another potential pathway for legal geographers, depending on future litigation choices.

Another way in which a legal geography lens could extend existing social science literature on CSG would be to explore anti-CSG protests, by investigating the physical spaces of protest and the legal frameworks which govern anti-CSG activity. Protest and dissent are themes that legal geographers are familiar with – and a critique of anti-CSG protest laws represents a promising research angle into the future. Another possibility for future research on the legal geography front could lie in analysing planners as legal geographers in their own right. This is due to the fact that planners are professionals who work within legal frameworks, while also being attentive to resolving problems with a spatial component across a wide range of land uses.

As acknowledged in the Thesis Contextual Statement, compensation matters remain underexplored in CSG social science literature and deserve greater scrutiny – notwithstanding obvious difficulties of access for researchers. It may be necessary for researchers to delay additional research on this facet of CSG until a body of case law specific to CSG has had time to develop. This is also true of the thousands of land access agreements reached between CSG companies and landholders in Queensland – notwithstanding the existence of industry templates, specific details of these agreements at an individualised level may be difficult to secure access to for research purposes. Another challenge presented in CSG research is to move beyond research that so far has generally focused on local and regional case studies at sites of extraction, to encompass points of CSG export and delivery, multinational negotiations and comparative legal regimes for unconventional gas internationally. In view of the current gas shortage questions being asked by politicians, stakeholder associations and others in Australia at the moment, CSG's international presence in the form of export agreements with other countries cannot be ignored in domestic studies – regardless of whether or not this analysis adopts a legal geography slant.

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## **Appendix 1: Published version of Chapter Three – Codifying coexistence: Land access frameworks for Queensland mining and agriculture in 1982 and 2010**

The published version of David J. Turton, 2014, 'Codifying Coexistence: Land Access Frameworks for Queensland Mining and Agriculture in 1982 and 2010'. *Journal of Australasian Mining History*, 12: 172-192 is reproduced on the following page.

## **Codifying coexistence: Land access frameworks for Queensland mining and agriculture in 1982 and 2010**

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Media and academic commentary on the growth of coal mining and coal seam gas development in Australia frequently utilises the theme of conflict between the needs of this industry and pre-existing land uses, namely agriculture, depicting these two industries in a struggle over livelihoods and landscape.<sup>1</sup> Historians and human geographers have noted the escalating friction between agriculture and coal mining in Australia from the 1980s onward. Acknowledging that conflict arose because of the increased proximity of the two sectors, frameworks designed to promote coexistence between agriculture and coal mining in this era are nonetheless missing from the literature.<sup>2</sup> Yet during the 1980s, the need for compromise between them was remarked upon.<sup>3</sup> Indeed, the challenge of promoting coexistence between mining and agricultural interests remains a topic of great interest for corporate social responsibility researchers in the present.<sup>4</sup> Therefore this case study of the preparation of a voluntary 'Explorer-Landholder Procedures: A Common-sense Guide to Good Relations Between Miners and Farmers' (the 'Guide'), in 1982, is offered as an example of an attempt to promote accommodation between agriculture and mining in Queensland, in order to highlight what might be possible in the present era through the current Land Access Code (the 'Code') – a document partly legislatively mandated and introduced in November 2010.<sup>5</sup> In seeking to draw on the experience of the Guide and evaluate the Code, a 'typology of relevance' for environmental history, as devised by Stephen Dovers, is referred to as a convenient structural format and analytical device.<sup>6</sup>

After discussing this typology, the literature concerning voluntary codes of conduct in the mining industry and the wider political context of the Guide's preparation will be detailed, followed by a brief overview of the legal background that informs land access arrangements in Queensland – before examining the case study.

It is argued that the Guide's formulation occurred without government involvement, relying instead on cooperation between industry representative bodies – the Queensland Grain Growers Association and the Queensland Chamber of Mines. However, the desire for an accommodative framework between these parties emerged in the context of broader government efforts to reform Queensland's mining legislation, culminating in the passage of the *Mining Act and Other Acts Amendment Act 1982* (Qld). The Guide is linked with a general growth in voluntary agreements between industry and government from the 1980s to the present. It is further suggested that the Guide may be of assistance in any future changes to the largely statutory-based Code, particularly as an example for improved relationships between stakeholders in a voluntary capacity.

### A Typology of Relevance

Dovers' typology indicates the potential for environmental history to constructively participate in contemporary sustainability debates and policy. Calling for a 'pragmatic' environmental history, Dovers argues that in addition to their normal scope of operations, a more explicit connection to the sustainability challenges of today should be made by historians.<sup>7</sup> Envisioning three levels of relevance where environmental history might be expected to offer insight, Dovers treats the first of these as offering a general historical perspective to seemingly 'new' sustainability challenges – essentially informing and contextualising contemporary problems.<sup>8</sup> In terms of this case study, this aspect of relevance can be seen in the extent to which provisions of the Guide are replicated in the modern-day Code, with both documents drafted to meet the challenge of ensuring the successful management of two crucial industries. Using historical analogies for contemporary events is of course as attractive to media commentators as it is to historians, whether to support a policy direction or criticise it – and may not necessarily be faulty in its application.<sup>9</sup> Coal seam gas has not escaped this, with Owen Powell noting the degree of parallel between modern coal seam gas access concerns and historical struggles over water rights in the Great Artesian Basin from the sinking of bores to further the ambitions of Australia's pastoral industry during the late 19<sup>th</sup> and early 20<sup>th</sup> centuries.<sup>10</sup>

A second layer of relevance focuses on the establishment of human and non/human baselines, as 'useable understandings of change in dynamic systems, be they natural or human, will not emerge without appreciation of previous states'.<sup>11</sup> The obvious application to this analysis lies in the types of factors that drove legislative change, how amendments to the *Mining Act* were found wanting amongst farmers and miners, such that they felt compelled to negotiate and then jointly release the Guide, to achieve the goals they desired for coexistence in the landscape.<sup>12</sup> While Queensland's legislative process was insufficient to respond to the requirements of all stakeholders in the 1980s – forcing a voluntary approach to the task – the law has become an essential instrument in protecting the interests of all parties in the present. Yet the shift to a legislatively endorsed Land Access Code is not complete, and still demands an exercise of voluntary goodwill in relation to part two of the Code (which deals with matters of communication and the negotiation of land access agreements), raising concerns amongst some stakeholders of unmet expectations. This was despite a recent review of the Code, which concluded that 'many landholders believe positive outcomes can be attributed to the Land Access Code'.<sup>13</sup>

Finally, Dovers posits that environmental history may be capable of presenting relevance through 'real policy, institutional, or management lessons to be learned from past experiences'.<sup>14</sup> Acknowledging that it is somewhat vulnerable to challenge,<sup>15</sup> this layer of relevance urges historians to investigate topical policy problems and institutional challenges by engaging in a 'search for precedents, warnings or models of [previous responses to environmental change]'.<sup>16</sup> Nor is Dovers alone in calling for historians to assume a place in the development of policy.<sup>17</sup> Before discussing the literature that informs this case study, it is stressed that the use of Dovers' typology should be viewed as 'a step along the way' to encouraging an increased range of

purposes for environmental history – rather than a final and determinative statement on its application.

### **Literature overview**

While recognising that mining history is ‘one of the neglected aspects of Australian environmental history’, with an emphasis towards the heritage of individual companies and nineteenth century gold rushes rather than more recent events,<sup>18</sup> that tendency is shifting in light of current controversies over mineral extraction in Australia.<sup>19</sup> Others, such as Ross Fitzgerald and Drew Hutton,<sup>20</sup> have assessed the environmental impact of Queensland’s mining heritage through what John McNeill has described as a political approach to environmental history, with investigations focussed on ‘law and state policy as it relates to the natural world’.<sup>21</sup> In terms of this case study, there has been a clear desire amongst legal commentators to acknowledge the history of Queensland’s *Mining Act* when relevant. The emergence of environmental responsibility as a policy objective in state legislation has been observed in the different purposes of the *Mining Act 1968* and its successor, the *Mineral Resources Act 1989*.<sup>22</sup> Specific attention has also been drawn to the *Mining Act and Other Acts Amendment Act 1982* (Qld) in the context of the development of compensation provisions for landholders.<sup>23</sup>

At the time of its enactment, media and academic commentary on the Act was somewhat limited.<sup>24</sup> For interested parties in mining, conservationist and agricultural circles, however, there was much to discuss when the Act came into operation on 1 August 1982.<sup>25</sup> This literature offers an insight into the priorities of the legislature during this period, but the Guide itself also received some attention as part of a wider effort to minimise the exploratory impacts of mining operations, inspiring the Northern Territory Chamber of Mines to prepare its own Code of Conduct for Mineral Explorers in consultation with rural organisations in 1983.<sup>26</sup>

Codes and guides of various forms have been utilised to manage interactions with the mining industry since at least the 1980s. At the national level the Australian Conservation Foundation worked alongside the Mining Council of Australia in 1997 to produce an industry code of practice, following a *Mining and Ecologically Sustainable Development* report in 1994.<sup>27</sup> Other examples of voluntary land access codes from this period can be found in Victoria, New South Wales and Western Australia.<sup>28</sup> More broadly, voluntary guidelines accorded well with the Australian coal industry’s stated preference for self-regulation in the 1980s, and the commissioning of studies to identify strategies to minimise the impact of their exploration activities on pastoral lands.<sup>29</sup> The fact that the Guide was implemented without the intervention of the Queensland Government is unusual for self-regulation schemes in general, given that governments often assume a facilitator role in bringing the requisite parties together to craft the desired standards.<sup>30</sup> The mining industry’s trend of striking agreements with primary producers which do not have statutory force has continued to the present, with the recent signing of a Principles of Land Access agreement in New South Wales, between AGL, Santos, Cotton Australia and the NSW Irrigators Council. The agreement is designed to grant the landholder the right to refuse drilling for coal seam gas on their land. However, the agreement does not extend to the right to refuse the development of



infrastructure associated with the industry on a farmer's property – namely power lines, roads and pipelines.<sup>31</sup>

Due to the types of lobby groups represented, this case study draws on historical conflicts between agricultural and mining interests which are framed in the context of competing expressions of capitalism – rather than a conservationist versus development-minded ethos – as evidenced, for example, in resource disputes between non-indigenous farmers and gold miners in colonial Zimbabwe (Southern Rhodesia).<sup>32</sup> After all, passage of a statute with the apparent aim of environmental protection does not necessarily mean that it originated with an explicitly 'green' motivation. The initial driving force behind Queensland's *Litter Act 1971*, for example, was sparked not by a Keep Australia Beautiful campaign (as occurred in Western Australia),<sup>33</sup> but political perceptions that the state's criminal laws were insufficient for responding to vandalism.<sup>34</sup> In taking this focus, it is acknowledged that the range of stakeholders involved in disputes around mining in Australia has expanded greatly since the early 1980s, with a far more prominent environment movement today - including their politically unusual alliance with farming groups through the anti-coal seam gas organisation Lock the Gate.<sup>35</sup> Although conservationists were notable for their absence from the negotiations leading to the Guide's creation, their collaboration with farming groups would become significant by the late 1980s with a joint Australian Conservation Foundation-National Farmers' Federation submission seeking government action on soil conservation, culminating in the rise of Landcare – a joint enterprise between farmers and conservationists designed to combat land degradation.<sup>36</sup> Finally, while it is clear that mining and agriculture were both important to the Queensland Government in the 1980s, the relative political significance of mining in comparison to agriculture should be recognised – given the State's multiple interests in mining, its adjudication responsibilities between those interests and the extent to which a State's policy objectives may align with those of industry.<sup>37</sup>

This is not to suggest that environmental protection was absent from the minds of rural lobby groups altogether in the early 1980s, but rather bound up in the task of preserving the landscape as a whole for economic purposes: 'The advent of open-cut mining in highly productive agricultural areas is ... a new development of major significance requiring wise and balanced legislation to protect our agricultural and environmental heritage'.<sup>38</sup> For the Queensland Producers' Federation, the question was one of balance, not exclusion: "I would like to make it clear that there has never been any suggestion that farmer organisations are against mining, or that primary producers wish to restrict fair and reasonable rights of companies to explore and survey land for possible future mining activities'.<sup>39</sup> It should also be noted that other contested land-uses, such as forestry, have encountered similar concerns to those engaged in mining when attempting to balance competing public and private benefits, whilst simultaneously striving to achieve improved social, economic and environmental outcomes.<sup>40</sup>

The place of Indigenous Australians in these debates must also be acknowledged, given their involvement with coal mining and coal seam gas extraction in both pro and anti-industry capacities.<sup>41</sup> While the Queensland Grain Growers

Association and the Queensland Chamber of Mines did not include any Indigenous stakeholders in their discussions around land access, these negotiations took place during a time of frequent controversy over the desire of the Bjelke-Petersen government (1968-87) to promote mining development at the expense of both environmental protection and the aspirations for land rights amongst Indigenous people of the State. This was demonstrated, for example, with bauxite development at Aurukun in Far North Queensland in the late 1970s.<sup>42</sup> Circumstances have evolved with the recognition of native title by the High Court of Australia in the 1992 *Mabo* decision, and their subsequent *Wik* determination in 1996, which found that native title could coexist with particular types of pastoral leases – with Indigenous customary tenure only being extinguished to the extent of any inconsistency with the rights of the pastoral lessee.<sup>43</sup> A political furore erupted in the aftermath of the judgment and amendments to the Commonwealth's *Native Title Act* were passed in 1998 to give 'new statutory comfort [to pastoralists] that any native title that might exist on their leases could not interfere with any of their activities'.<sup>44</sup>

One current example of direct involvement by Indigenous people in coal and coal seam gas development proposals can be seen at Mount Mulligan (Nguddaboolgan) – 100 kilometres west of Cairns (a site infamous as the scene of Queensland's worst land disaster in 1921).<sup>45</sup> The Djungan People have held native title interests at the site since 2012, and in 2013 seemingly executed a legally mandated Conduct and Compensation Agreement with the Perth-based Mantle Mining Corporation, thus permitting the company access to their land for exploration purposes.<sup>46</sup> Yet there is community division as to whether or not the company has a social licence to operate, with ongoing concerns regarding the potential for contamination of underground water aquifers due to exploration activities.<sup>47</sup> The above context thus provides a sufficient grounding upon which to proceed with a brief overview of mining law as it relates to land access concerns and the formulation of the Code and Guide.

### **Land access legal background**

Historically, coal resources were bundled together with freehold grants to land for landholders, permitting them access (at common law) to both subsurface metals and topsoil rights. Exceptions to this were gold and silver, unless the Crown had reserved the right to the minerals in a deed of grant.<sup>48</sup> Eventually the various Australian states (at that time colonies) 'set about recapturing coal rights from old property holdings, and stripping them from new land grants'.<sup>49</sup> Queensland took several decades to formally reserve coal resources for the Crown in the *Mining on Private Land Act 1909* – including the Crown's right to access land to engage in 'searching for or working on any mines'.<sup>50</sup> Prior to this the State had largely (with the exception of gold) been content to dispose of land for the purposes of mining, thereby permitting the property in the minerals to pass to the freeholder.

By reserving petroleum resources,<sup>51</sup> the Crown authorises the grant of titles (exploration and production licences) over land owned in fee simple (a type of freehold interest) or held as leasehold estates. Accordingly mining titles can be issued over

privately-held freehold land, native title holdings and Crown leases. Crown leasehold ownership is common in rural Australia – with a long history as a flexible policy instrument to secure economic and social development.<sup>52</sup> It must be emphasised that land granted in fee simple does not equate to absolute ownership, as it remains subject to the doctrine of tenure – the idea being that ultimately the Crown owns all land and is charged with granting interests in land to landholders.<sup>53</sup> Title to petroleum resources is generally transferred from the Crown to a mining company with the issue of a licence and ‘ownership’ of that resource changes from the Crown to the company (titleholder) at the well-head, ‘which is also when royalties are calculated and paid [to the State]’.<sup>54</sup>

Landholders (including Indigenous native titleholders) must negotiate land access and compensation agreements with mining titleholders - namely coal and coal seam gas companies.<sup>55</sup> Should the parties fail to reach agreement, or if access is denied to the titleholder, arbitration and litigation may follow – with the potential for an ‘eventual court determination requiring access based upon the terms determined by the court or arbitrator’.<sup>56</sup> Once extracted, coal and coal seam gas become the property of the titleholder - rather than the landholder.<sup>57</sup> The right to exclude others from one’s premises is of course fundamental to the ownership of real property, with the absence of consent (whether implied or express) ushering in a possible action in trespass.<sup>58</sup> However, petroleum titleholders already have this consent via the relevant Act and therefore this entitlement is largely voided in New South Wales and Queensland.<sup>59</sup> While coal seam gas has been referred to as ‘the modern property law conundrum’,<sup>60</sup> a link to the past behaviour of the mining industry in relation to Indigenous native title can certainly be made:

Ironically, the exercise by miners of CSG rights is in direct contrast to the mining industry’s widely publicised untruthful objections to native title following the *Mabo* and *Wik* decisions. Aggressive national campaigns were run at the time, warning freehold landowners of the threat that native title posed to the maintenance and exercise of private property rights. Native title, that most fragile of all property rights, was never contemplated as being in competition with freehold title in spite of the miners’ claims. In contrast, CSG rights directly and explicitly collide with what ... [Sir William Blackstone called] ‘the highest and most extensive interest that a man [*sic*] can have’ in land.<sup>61</sup>

In an attempt to alleviate understandable community disquiet, land access arrangements have been introduced in Queensland in various guises – one early example being the Guide. The political climate in which this document was produced is canvassed below.

### **Seeking amendments and more**

Before exploring the development of the Guide and its contents, it is first necessary to understand the wider political environment that surrounded calls for changes to Queensland’s *Mining Act*. Reform efforts were made at a time of growth for the state’s export coal industry, with the exploration of the Bowen Basin presenting much promise. Schooled in the policy priorities of the Nicklin government before it (1957-68), the Bjelke-Petersen administration saw the State’s role as a facilitator of ‘development’. To

this end, state-supported infrastructure for the transportation and export of resources was a deliberate strategy adopted by government to encourage mining exploration and foreign investment.<sup>62</sup> Alongside Victoria, Queensland had earned a reputation as a land of open-cut coal mines by the 1980s, with the Sunshine State seeing significant population growth in several mining centres in the 1970s as a result.<sup>63</sup> Against this favourable background, by mid-1980 Queensland had 43 coal mines in operation, 22 of which were open-cut.<sup>64</sup>

Preferential treatment of mining operations ahead of other areas of public policy, namely environmental protection, is widely acknowledged in the literature concerning the Bjelke-Petersen era. But it should be said that anti-environmentalism and a pro-development focus was not a uniquely Queensland 'state of mind' in the 1970s and 1980s – with similar stances taken by governments throughout Australia, albeit with variations in degree.<sup>65</sup> Studies of Queensland's environmental politics and policy-making from the 1990s to the present would suggest that political affiliation (Labor or Liberal/National party) has mattered little to the enduring 'growth first' message of government.<sup>66</sup> The attempt to reform Queensland's mining legislation through industry consultation in the late 1970s and early 1980s was therefore a moment in which government was prepared to acknowledge that agriculture and mining both had a role to play in the economic development of the State.

Emerging out of the Queensland National Party's Annual Conference in July 1978,<sup>67</sup> a legislative streamlining agenda was posed for 'the entry upon and acquisition of land for the purposes of exploration and mining'.<sup>68</sup> Following on from the conference, a resolution to the party's State Management Committee created a select committee to 'investigate mining development as it affects rural lands, with a view to consolidating previous submissions and including such additional recommendations where need was demonstrated by the committee's enquiries'.<sup>69</sup> After holding public meetings at various centres and taking submissions from many farming organisations, mining companies and individual landholders, the Rural Policy Committee released its findings for the consideration of government on 25 September 1981.

The Report suggested a variety of possible amendments, including the replacement of the Mining Warden's Court with a Queensland Land Court, the development of a new Authority to Prospect for entry on to private land, increased bond requirements for mining companies to compensate for possible damage to landholders' property, and a recommendation that the calculation of fair market value compensation for landholders include a 'social disturbance' factor.<sup>70</sup> While the Report and Bill were focussed on mining in rural areas of Queensland, both documents provoked some observers to press for improvements to the planning process for mining near urban centres. The Labor Opposition member for Ipswich West, David Underwood, convened a seminar of local government authorities and mining companies to discuss the issue – although the Minister for Mines and Energy, Ivan Gibbs (Fig. 1), declined an invitation to attend.<sup>71</sup> Already a known voice on urban environmental matters in the Labor party,<sup>72</sup> Underwood expressed particular concern at a seeming lack of coordination between local government authorities and the Mines Department when planning residential development in areas with coal reserves. He urged that a resource management study be

implemented for the West Moreton region (close to Brisbane) in order to cope with the industry's expected future growth.<sup>73</sup>

Beyond the Report's recommendations, three years of consultations with rural organisations and mining companies also revealed problems with mining sub-contractors opening fences and pushing down trees on properties without the permission of landholders.<sup>74</sup> Troubled by these developments, in 1980 the Queensland Grain Growers Association produced the booklet *Mining and the Farmer: A Farmers' Guide to Provisions of the Mining Act*, distributing this to other rural organisations, including the sugar industry.<sup>75</sup> While this publication lacked input from the mining industry itself, it was designed to encourage farmers to seek assistance in their negotiations with mining operators (Fig. 2).

**Figure 1:** Ivan Gibbs (right), Minister for Mines and Energy and National Party MLA for Albert, with Logan City Council Alderman, Ian Thomas, 1983.



Source: Logan City Council.

Additional complaints of soil erosion caused by mining surveys were raised in the months after the National Party's Report had been submitted to the government.<sup>76</sup> These incidents caused the Queensland Grain Growers Association to convene a meeting with the Queensland Chamber of Mines to improve industry awareness and advocate caution. Difficulties included 'an extremely badly managed seismic survey at Goondiwindi and a similarly badly managed coal survey at Daandine near Dalby [in 1981]. Both had created ... serious erosion hazards as well as tremendous disruption to the landholders concerned'.<sup>77</sup>

While the issue of mining and agriculture proximity was raised when the Mining Act and Other Acts Amendment Bill was first presented to Parliament in December 1981,<sup>78</sup> the Department of Primary Industries had been conscious of this for some time.

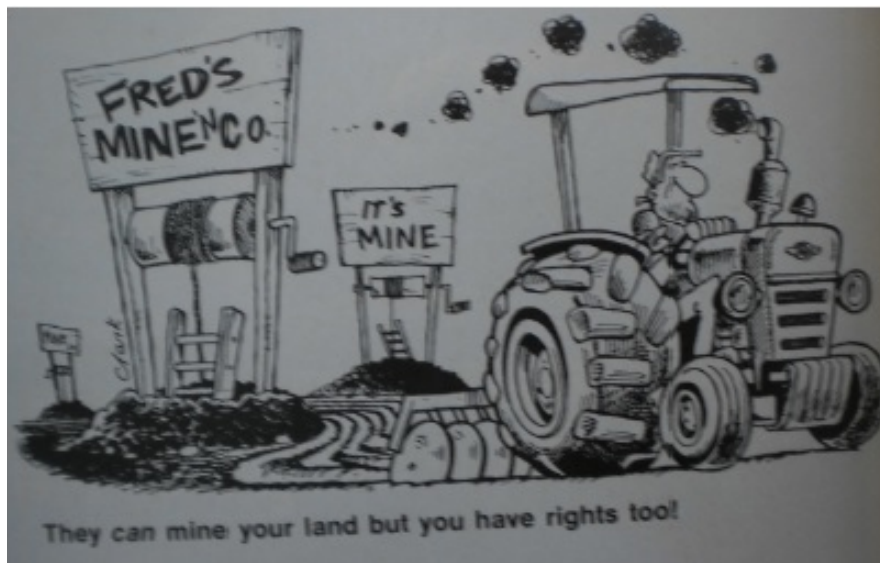
Dr Graham Alexander, Director-General of the Department, was keenly aware of the risks and rewards presented by the State's mineral expansion and saw fit to remark on this as one of the many challenges facing the agricultural sector as it greeted the 1980s:

The renewed interest and capital investment in mining represents very much a mixed bag for Queensland agriculture. Mining competes for land, water and labour resources but also creates market demand for some agricultural commodities in localised areas. Moreover, agriculture is likely to reap some external economies through the provision of better transport facilities and in the development of improved electricity and communications systems.<sup>79</sup>

As the newly-appointed Minister for the Department of Primary Industries in 1980, Michael Ahern was particularly mindful of the need to be receptive to the concerns of the rural sector, with its many pressure groups enthusiastic about participating in what was a significant policy domain for the Queensland National Party.<sup>80</sup> Ahern expressed the hope that both mining and agricultural industries could compromise effectively for mutual benefit, when opening a conference on the subject at Biloela in central Queensland for the Australian Institute of Agricultural Science on 6 May 1981. Ahern urged the conference participants to work towards devising a 'rational approach' to coexistence – stressing the significance of both sectors to the Queensland economy.<sup>81</sup> It would seem that the government did not wish to be drawn into the arguments of the parties. A desire for distance between government and disputes between mining and agricultural interests was not peculiar to Queensland, as authorities in colonial Zimbabwe adopted a similar 'hands off' approach in the early twentieth century in contests between non-indigenous farmers and gold miners over timber and water exploitation. The State confined itself to an observer status for several decades before introducing conservation legislation.<sup>82</sup>

Prior to Parliament's consideration of amendments to the *Mining Act* in December 1981, the Queensland Grain Growers Association pressed the Minister for Mines and Energy, Ivan Gibbs, to replace 'Permits to Enter' for exploration activities under the Act with what it called a 'Prospecting Agreement'. It saw the Agreement as an opportunity for a court to initially assess a mining operator's work program before exploration began, thereby putting the landholder in an improved negotiating position. The Agreement would include measures that took account of erosion and rehabilitation, compensation, exploration methods and the timing of that work – including any agreement for repairs where necessary.<sup>83</sup> However, Gibbs believed the proposed Agreement would be 'unworkable because of the large number of Authorities to Prospect which are in force for minerals, compared to a much small number of Petroleum Authorities, where [the measures proposed by the Association were] already provided for'. The Association countered that the 'Prospecting Agreement we are proposing would really only formalise the voluntary convention which we are negotiating with the Chamber of Mines, with every chance of success'.<sup>84</sup> Their arguments were to no avail and the Association was left disappointed with the omission of their suggestion from the Act – but saw the mining industry as being more cooperative than government in its willingness to resolve 'problems before they arise'.<sup>85</sup>

**Figure 2:** *Mining law education was a priority for farming organisations.*



Source: *Australian Canegrower*, September 1981, p. 80.

Having left the Minister unconvinced of their case, formal negotiations between the Queensland Grain Growers Association and the Queensland Chamber of Mines were entered into on 11 November 1981. The Chamber was initially ‘somewhat sceptical about the need for guidelines’ to manage the relationship between mining operators and landholders during the exploration phase – viewing the problems raised by farmers as relevant to a few isolated incidents involving sub-contractors. However, company representatives from both the coal and petroleum industries conceded during the meeting that ‘most of the difficulties experienced were due to lack of communication between company management and their field operators’. The Chamber’s delegation was ultimately convinced that the disruption caused by the operations of mining survey companies was unacceptable – endeavouring ‘to recommend to their organisation that they co-operate with ... [the Association] in developing a convention or code of ethics relating to prospecting’. By the conclusion of the meeting, the Association was satisfied that there was a ‘good prospect of our agreeing on a standard form of prospecting agreement which could be voluntarily adopted irrespective of what happens to the Mining Act’.<sup>86</sup>

In the months that followed, the Chamber took the Association’s draft guidelines for landholder/miner relations and adapted them to a format deemed acceptable to member companies. It earned the respect of the Association by strengthening the document ‘in some respects’. The Chamber then circulated the proposed ‘Guidelines for Exploration’ among its members, ‘giving them the opportunity to endorse it and so have their names listed as subscribing to the convention’.<sup>87</sup> Ivan Gibbs was made aware of these developments and highlighted them when addressing the State Council of the Queensland Cane Growers’ Association at Toowoomba in April 1982. In praising the forging of a new spirit of accommodation and trust between producer organisations and the Chamber of Mines, Gibbs conceived of a ‘new era of co-operation’ between mining and agricultural interests, driven by both industries breaking new ground and the

increased ‘necessity for both parties to live together’.<sup>88</sup> Having gained the attention of the Minister, the Queensland Grain Growers Association also asked Gibbs to adopt the Guide ‘as the rules of behaviour and performance expected of those who hold Authorities to Prospect’.<sup>89</sup>

The Guide was released in late June 1982 and the Chamber of Mines saw the document’s production as ‘a really worthwhile exercise in ensuring that relations between the two important primary industries remains at the very satisfactory level of recent years’.<sup>90</sup> The Guide placed a clear emphasis on mining companies assuming responsibility for promoting better relationships between themselves and farmers. In responding to questions from the media, the Executive Director of the Queensland Chamber of Mines, Michael Pinnock, agreed that the Guide’s provisions ‘would add to development and exploration costs’ in some instances, but stressed that the Guide was a necessity and that the Chamber’s members were unanimous in their support for the document.<sup>91</sup> For its part, the Queensland Grain Growers Association regretted that the Guide’s preparation ‘took place in such a way that ... other producer organisations did not have the opportunity to participate ... [but hoped it was] acceptable’ – and sought the opinion of these other groups to pinpoint any problems with the Guidelines as they stood.<sup>92</sup> While this raises questions about the quality of stakeholder involvement in the process, when evaluating the progress made in fostering an improved relationship between farmers and miners by August 1982, the General Manager for the Queensland Grain Growers Association, G.T. Houen, concluded:

Many of our growers would have believed two years ago that the system was stacked against them, with the Government and the mining companies in league with each other and mining companies enjoying political patronage. But I think they would now be more confident about their position in the light of the co-operation which the Chamber of Mines has extended to Queensland Graingrowers and other producer organisations. The recent release of our joint ‘Explorer-Landholder Procedures’ booklet is a milestone.<sup>93</sup>

Although soil erosion remained an ongoing challenge for grain growers,<sup>94</sup> by 1984 mining and farming groups both agreed that ‘overall, communications between groups [were] much improved by industry action rather than Government intervention’.<sup>95</sup> Although government had not taken a role in formulating the Guide, it inadvertently brought the Chamber and Association together to create the document, through its refusal to adopt the Association’s recommendation for a formal ‘Prospecting Agreement’. Clearly, the parties saw the Guide as a moment of significance, yet what did the pamphlet offer by means of managing coexistence, and how is this document relevant to the Queensland Land Access Code 2010? From the information presented above, the Guide provides historical context for modern-day discussions of the Code, as the latest example of a long line of voluntary frameworks for positive land use. It provokes questions about the merits or otherwise of voluntary guidelines for managing stakeholder behaviour, the extent to which mining companies placed value in building positive community relationships, and the requirements for entering into a social licence to operate. Therefore, the next section will examine the Guide’s objectives.



### **The Guide's purpose**

With the ultimate goal of ensuring 'satisfactory working relationships', the Guide sought to enshrine some general principles into the mining exploration process. These comprised close liaison with all landholders affected by exploration; minimising damage to infrastructure, vegetation and land; minimising disturbance to landholders and livestock; rectifying, without undue delay, any damage which could be reasonably repaired; promptly paying the landholder for any agreed damages; and abiding by additional 'Explorers Procedures'. These Procedures were premised on a mining exploration company selecting a key individual 'with an affinity for people on the land, and if possible, a knowledge of farming and grazing practice to be the Field Supervisor for the [exploration] survey'. The Field Supervisor envisioned by the Guide would be an employee of the exploration company, and would therefore have knowledge of all aspects of the survey, allowing them to 'inspect the area well in advance and pre-plan the survey to cause minimum disturbance to the land-holder and damage to his [*sic*] property'. Aside from this project knowledge, the Guide emphasised the value in a Field Supervisor engaging in direct contact with a landholder prior to a company's entry on to a property, allowing them to discuss the plans for exploration – including the location of potential problems such as 'buried water pipes, contour banks, shade clumps, erosion prone land ... gates and fences'. In view of the previous concerns with mining sub-contractors, the Guide stressed that 'contractors and subcontractors [should be] aware of company policy in the field and ensure that as far as practicable it is here adhered to ... [It was also noted that] the tenement holder and operator have the [ultimate] responsibility for the operation'.<sup>96</sup>

Looking beyond the importance of effective professional relationships between landholders and miners, the Guide contained other points of note, such as ensuring that local government authorities were aware of the survey operation being carried out, the use of vehicles on roads (including any repairs to roads as a result of essential movement during wet weather), the cleaning of vehicles to prevent the spread of weeds, and the flexible positioning of bores to 'reduce to a minimum the destruction of trees and the creation of erosion hazards'. The landholder was to be invited 'to inspect the work area' when the project was complete 'so that any problems can be discussed'. Disturbance to the soil's surface was to be minimised wherever possible, 'particularly on cultivated land'. When damage did occur, the Guide saw the Field Supervisor's role as one of negotiator, with the authority to 'finalise compensation/restoration with the minimum of delay'.<sup>97</sup> While endorsed by the Queensland mining industry in general, the document itself was of a voluntary nature. Although the Guide lacked the statutory authority of the present-day land access regime, as will be shown below, both relied upon an expectation of goodwill between the parties.

### **Land Access Code implementation**

In contrast to the Guide, where government involvement was minimal, the Queensland Land Access Code owes its existence to the creation of a Land Access Working Group (LAWG) in 2008. Comprised of representatives from the State Government, agricultural and resources sectors, the LAWG was charged with formulating solutions

to land access issues and improving relationships between the resources and agricultural industries – developing Queensland’s *Land Access Policy Framework 2009* and identifying deficiencies in the existing legislative framework.<sup>98</sup> The Land Access Code is one resulting reform from that process and indeed replaced the *Queensland Mining, Petroleum and Gas, Geothermal and Greenhouse Gas Storage Land Access Code* and the *Code of Conduct – Procedures for Sound Landholder/Explorer Relations*.<sup>99</sup> There are, however, several similarities between the Guide and Land Access Code. In imposing ‘a higher standard of behaviour on resource companies’ than had existed previously, the announcement of the present Code by the then Minister for Natural Resources, Mines and Energy, Stephen Robertson, echoed earlier sentiments from the 1980s: ‘The co-existence of both [mining and agricultural] sectors is fundamental to Queensland’s future economic prosperity and I am confident that improved transparency, equity and communication will help foster and maintain good relations between all parties.’<sup>100</sup>

The Code is applicable to all Queensland resources legislation which deals with authorised activities on private land: the *Mineral Resources Act 1989*, *Petroleum and Gas (Production and Safety) Act 2004*, *Petroleum Act 1923*, *Greenhouse Gas Storage Act 2009* and the *Geothermal Energy Act 2010*.<sup>101</sup> In this respect alone, the Code is far wider in its application than the Guide, as the latter was concerned solely with Authorities to Prospect under the *Mining Act* – the predecessor of the *Mineral Resources Act 1989*. Unlike the Guide, the Land Access Code is a creature of statute.<sup>102</sup> While the Act supports the resolution of conflicts between coal seam gas, other mining and petroleum tenures,<sup>103</sup> it is silent on the protection of non-mining private property rights.<sup>104</sup>

The Code’s purposes are twofold: ‘(a) ... [to state] best practice guidelines for communication between the holders of authorities and owners and occupiers of private land; (b) [to impose] on the authorities mandatory conditions concerning the conduct of authorised activities on private land’.<sup>105</sup> Part 2 of the Code is devoted to non-mandatory provisions, concerned with general principles to foster good relations between the parties. Like its Guide predecessor, close liaison with landholders is expected of the holder of a resource authority under the Code. Early warning of activities and prompt rectification of damage is also expected. In addition, the Code advises that a mining operator should ‘regard as confidential information obtained about landholder’s operations’.<sup>106</sup> A landholder is expected to liaise with an authority holder in good faith; engage with the holder of an authority ‘to identify issues such as values of property and operational considerations’; ‘respect the rights and activities of holders and provide reasonable access’, negotiate with the resource authority to arrive at suitable conduct and compensation arrangements; and regard information obtained about the holder’s operations as confidential.<sup>107</sup> Other provisions for communication, negotiating agreements and the carrying out of activities by the authority holder replicate many of the points raised in the Guide (such as appointing a field supervisor or site manager to liaise with the landholder), but unlike the Guide, there is an emphasis on the landholder accepting responsibility ‘to actively engage with the [authority] holder and make time available to discuss relevant issues’.<sup>108</sup>

Part 3 of the Code contains mandatory conditions for the holders of resource authorities. This part of the Code is concerned with tenures under the relevant resources legislation mentioned above, and requires that authority holders (and all those acting for them) undertake induction training to ensure awareness of their obligations under resources legislation, the Code, and any agreements between themselves and the landholder. Access points for entering on to a landholder's property are given particular attention under the Code, with a special emphasis on avoiding interference with a landholder's business activities and repairs to any damage resulting from the use of roads and tracks. Minimal disturbance is a theme extended to livestock, the use of grids, fences and gates, with immediate notification of any changes being a significant element of the Code.<sup>109</sup> An explicit obligation to prevent the spread of declared pests extends the general duty of the Guide from one based on simply being 'aware' of weed infestation and livestock diseases (with an expectation of suitable precautionary measures for washing down vehicles), to a requirement that the *Land Protection (Pest and Stock Route Management) Act 2002* (Qld) be adhered to.<sup>110</sup> Having surveyed the Code and Guide, some thoughts as to the Guide's possible relevance to the new regime follow.

### Scope of relevance

The shift in expectations for landholder/miner interactions mentioned above in the Guide and Code are indicative of a more general discourse of responsibility in the history of Queensland land use policy. Katherine Witt has divided this discourse into a series of epochs, namely: Epoch 1: pre-1957, 'socialist' Queensland; Epoch 2: 1957-89, Queensland 'countrymindedness'; Epoch 3: 1989 to present, Queensland 'reformed'.<sup>111</sup> She suggests that a fourth epoch is underway as a result of 'new values in coal seam gas in rural Queensland'.<sup>112</sup> The Code and its supporting regulatory framework may therefore be an indication of this. While the introduction of statutes is often a reactive process to changing societal values,<sup>113</sup> it is equally important to note that legal frameworks are also bound to 'enduring power relations and precedents' – which 'often ensure that longstanding understandings of human relations with the natural world persist'.<sup>114</sup>

Katherine Witt contends that within the history of Queensland's political discourse 'the rights of land ownership have remained peculiarly unresolved in the perceptions of rural landholders' – citing the expansion of coal seam gas extraction on agricultural land as an example of the reappearance of a property rights discourse.<sup>115</sup> That statutory provisions governing land access are often reactive instruments rather than proactive should not surprise, as observed by Tina Hunter in 2011: 'At present the Western Australia government has not developed a statewide access policy framework or legislative provisions regarding land access [for shale gas extraction]. This is not unusual, given that Queensland only developed the policy framework and Access Code in 2010, many years after commercial CSG production commenced in that State'.<sup>116</sup>

At a general, contextual level, the Guide offers an example of a period in which constructive dialogue between miners and farmers was not only feasible, but capable of yielding mutually agreeable outcomes. Remembering historical instances of

accommodation can be difficult in the light of current controversies, but deserves to be recognised and perhaps reflected upon as a means of tempering heated disagreement. This is also consistent with Dovers' third category of relevance. In a similar vein, many of the problems encountered by an embryonic coal seam gas industry in Queensland in the late 1970s – particularly those relating to water extraction – have continued in the present, with Luke Keogh arguing that 'owning up to this history would place policy makers and regulators in a position to strengthen current regulation'.<sup>117</sup> With 'fracking' for coal seam gas in Queensland and New South Wales currently presenting much controversy, there is potential for an historical perspective to be useful to all parties in arguments around the industry's social licence to operate.

There is also an argument that coal seam gas is 'no different to any other productive land use within a landscape'<sup>118</sup> – with both threats and opportunities on offer. Multiple, competing requirements are ultimately a reality confronted by other sectors beyond mining, and the experiences of other contentious land uses may offer a map of sorts to improved relationships between stakeholders. Some of the findings from a recent study of plantation forestry and social acceptance in Western Australia and Tasmania could serve as markers in a coal seam gas context – particularly given the latter's export focus, physical presence in landscapes, capacity to generate local employment opportunities in rural areas and the longevity of the industry:

Plantations were considered more acceptable when planted on only part of a property rather than a whole property. Plantations were considered more acceptable in areas with local processing facilities than in areas where wood-chips are exported elsewhere. Plantations were considered more acceptable in areas with a few plantations than in areas with many or no plantations.<sup>119</sup>

The potential relevance of the Guide to the Land Access Code might be found in other ways, such as the Code's statutory endorsement. While this can be seen as beneficial for all involved, as noted above, the lack of enforceable guidelines for part 2 of the Code has frustrated some landholders, who perceive this aspect of the Code to be insufficient – arguing that it should 'be given a higher profile in a legislative sense' to force compliance.<sup>120</sup> General complaints about the Code might be resolved through better training for industry, in terms of their obligations when accessing a property.<sup>121</sup> Other problems raised with part 2 of the Code relate to pest and weed management provisions, which could be 'better explained' and 'cover off on species that are not declared pest and weed species but are locally significant'.<sup>122</sup>

Despite concerns from those consulted in the rural sector, these perspectives were not included in any formal recommendations from the Queensland Land Access Review Panel, nor were they discussed in the government's response to the Panel's report.<sup>123</sup> Should landholders continue to advocate for changes to part 2 of the Code in proposed future reviews of the Queensland Land Access Framework,<sup>124</sup> it could be useful to point out the voluntary predecessors of the Code, including the Guide. Doing so would highlight the fact that an entirely voluntary document has had at least some level of historical success in creating an environment of improved relationships between farmers and miners, without the advantage of statutory force. This could assist in

demonstrating that legally enforceable guidelines may not be necessary and that other means of securing compliance with the Code may be more appropriate.

### **Conclusion**

From the above case study of cooperation between the Queensland Grain Growers Association and Queensland Chamber of Mines in 1981-82, it has been shown that their jointly-published Guide emerged out of dissatisfaction with the statutory framework for the exploration of minerals in landscapes of primary industry. Despite initial reluctance, it was recognised that accommodation of the two sectors was desirable and that appropriate mechanisms could be introduced between the two bodies in the absence of government authority. The Guide was released and used as an example for other jurisdictions to follow. It has also been argued that this historical instance of accommodation between the two sectors is relevant to the current Queensland Land Access Code and Dovers' typology for environmental history, as both a contextual example (indicating that balancing competing land uses is not new) and an historical baseline – which may be relevant in demonstrating how stakeholders react to voluntary frameworks, as opposed to those largely enforced by statute.

The attempt of the Code to create a sense of shared responsibility between farmers and miners is a step forward from the Guide's emphasis on mining exploration companies interacting appropriately with landholders. Yet, given that voluntary goodwill is still a crucial part of managing that relationship, it might be argued that the experience of the Guide also links to Dovers' third category of relevance for environmental history in terms of a direct policy lesson – by offering a means of reframing current stakeholder perceptions of the Code and possible changes to it in the future. It is also clear that environmental damage was ongoing after the introduction of the Guide, and that it remains a serious issue in spite of the guidance provided by the Land Access Code. These experiments with accommodation between farmers and miners can be expected to continue, ideally with more evaluation into how social, economic and environmental harms from competing land use requirements can be reduced. With coal and coal seam gas development in Queensland currently driving the expansion of port infrastructure at Abbot Point (near Bowen) and Gladstone – with additional implications for the Great Barrier Reef and World Heritage management in the context of climate change – these industries have drawn in a range of stakeholders which extends well beyond farmers and conservationists anxious about land access. Therefore, further research is to be encouraged to determine if other historical precedents can inform contemporary practices.

### **Acknowledgements**

I wish to thank Professor Stephen Dovers, Professor Eric Pawson and Sonya Duus for critiquing an earlier draft of this manuscript. I am grateful to Fiona Simms-Farn of the Queensland Department of Agriculture, Fisheries and Forestry for granting permission to view material in the Queensland State Archives ahead of the normal access period. This research was supported by an Australian Postgraduate Award and a Supplementary Scholarship from the Fenner School of Environment and Society, ANU.

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## **Appendix 2: Published version of Chapter Four – Unconventional Gas in Australia: Towards a Legal Geography**

The published version of David J. Turton, 2015, 'Unconventional Gas in Australia: Towards a Legal Geography'. *Geographical Research*, 53(1): 53-67 is reproduced on the following page.

# Unconventional Gas in Australia: Towards a Legal Geography

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*Received 6 August 2014; Revised 1 December 2014; Accepted 21 December 2014*

## Abstract

Recent commentary on future research directions for legal geography highlights the need for studies that are historically grounded and focused on human–environment interactions in rural settings. As a current, controversial land use in Australia, unconventional gas (UG) development provides an ideal lens through which researchers can investigate these themes. Utilising emerging international literature and current Australian examples, this paper surveys major trends in the Australian literature relating to UG, before exploring some of the ways in which Australian legal geographers might contribute constructively to community debates around this resource. Seeking to encourage further analysis, this paper contributes to this developing literature by focusing on two key areas: the various legal actors involved in UG development in Australia (including their regulatory choices, spatial interpretations, expertise, and influence) and the implications for legal geography where attempts are made to establish ‘social licence’ through contractual arrangements between industry and individual landholders. This article also delves into the place of Indigenous Australians in relation to UG extraction and the questions this resource raises about land use conflicts in Australia more generally – offering suggestions for comparative international studies and further critique at the domestic level.

**KEY WORDS** *unconventional gas; legal geography; law; geography; Australia*

## Introduction

Legal geography is an increasingly dynamic research area, ‘less a “field”, than braided lines of inquiry that have emerged out of the confluence of various intellectual interests’ since the 1980s (Braverman *et al.*, 2014, 1). Arguably not finding its voice as a disciplinary endeavour until 1994, with the publication of Nicholas Blomley’s seminal *Law, Space and the Geographies of Power* (Delaney, 2014), Blomley called for studies that evaluate ‘the manner in which legal practice serves to produce space yet, in turn, is shaped by a sociospatial context’ (1994, 51). In a recent survey of Australian perspectives on the subject, Bartel *et al.* (2013, 349) concluded that

legal geography’s ‘greatest impact is where its focus reveals the importance of scale, time and connection in specific local contexts’ and that by ‘situating law in space, that is within its physical conditions and limits, legal geography encourages place-based knowledge to form law’s basis’. By making this claim, Bartel *et al.* (2013) extend legal geography’s ambitions from that of a sociological critique of the law (e.g., Delaney *et al.*, 2001), to advocate for a reconfigured ‘relation between society and the natural world itself’ (Graham, 2011, 16).

With scholarly interest in unconventional gas (UG) growing across the physical and social sciences (Lave and Lutz, 2014), an attempt is made

to selectively assess the extant Australian literature on this contested land use from a legal geography perspective, identifying ways in which this discipline might contribute to the public debate surrounding this resource. Sources of methane, ‘unconventional natural gas’ comprises three types: shale gas (SG), coal seam gas (CSG) (also known as coal-bed methane and linked with underground coal seams), and tight gas. All three forms are present within Australia, although their accessibility and commercial readiness vary, with shale and tight gas located within rock formations that pose extraction difficulties (Williams *et al.*, 2012; Measham and Fleming, 2014). Arguing that legal geography offers many insights into UG development in Australia and drawing on possible international comparisons, the following topics are considered: Conduct and Compensation Agreements in Queensland, litigation mechanisms, the multi-faceted place of lawyers and judges, legal precedent as a protest strategy for anti-CSG activism, the role of local government in approving protest camps, and finally questions of compensation. Legal geography might also be a fruitful lens for studying other contentious land uses. In setting out their aims for *The Expanding Spaces of Law: A Timely Legal Geography*, Braverman *et al.* (2014) contend that silences and gaps abound within the literature of this field. Two are particularly pertinent for this review: the tendency for legal geography writings to exclude the rural from their investigations and to avoid historically grounded analysis in favour of exploring the connections between contemporary urban spaces and the law. This urban focus does of course have merit in a UG context, such as explaining setback distance ordinances for SG drilling in urban counties of Texas (Fry, 2013). However, as much of Australia’s UG expansion is occurring in rural localities, a focus on this aspect of the sector’s legal geography would be beneficial for researchers.

Summing up the efforts of legal geography for their own critique of SG regulation in Pennsylvania, Andrews and McCarthy argue that researchers have ‘paid far too little attention to the environment as both an object of governance and a terrain of struggle with respect to the law’ (2014, 7). Although their absence has been noted in the wider legal geography literature (Delaney, 2001), issues relating to the environment and the place of the law within it have intrigued Australian historical geographers (e.g., Stratford, 1993; Stubbs, 2001; Holmes, 2014).

More recently, a legal geography slant has proved attractive to those investigating siting disputes through an environmental justice lens (e.g., Jessup, 2013). Other socio-legal arenas may assist in informing that research direction in the future (e.g., analysis of the Commonwealth’s 2007 Northern Territory Emergency Response, see Keenan [2013] and Crabtree [2013]).

This paper seeks to contribute to this growing research effort, reviewing some of the ways in which legal geography may aid in developing a richer understanding of the UG sector in Australia. This includes the manner in which this industry is disputed by pressure groups on a national scale, focusing on two areas in the emerging literature. The first is through studying the types of legal actors involved, their choices, geographical interpretations, and the influence of their expertise upon regulatory decisions. The second area for focus are the attempts made by companies to achieve a community ‘social licence’ via contractual agreements with individual landholders, considering also protest strategies employed by social movements to counter such efforts. Other issues are noted, including lobbying efforts to alter the physical extent of regulatory measures for UG and the emerging role of Indigenous people in the development of this industry. Drawing on recent international commentary and using current examples to demonstrate the applicability of this analysis in an Australian context, this paper argues that the opportunities and risks posed by UG development provide an ideal setting for researchers to test various themes in the legal geography literature in greater depth.

### **Law, geography, and unconventional gas**

Mining and UG extraction has engaged the interest of legal geography scholars for some years, with research in the United States examining the historical interconnection between mining law and geography (Matthews, 1997), the present-day competition between mining and Indigenous cultural heritage legislation (Benson, 2012), the power of property law as a source of social disorder in the Appalachian coalfields (Haas, 2008a; 2008b), and the politics of a particular statute and the constitution of expert committees reaching planning decisions (Hudgins and Poole, 2014; Simonelli, 2014). Andrews and McCarthy (2014) recently combined the analytical tools of legal geography and political ecology to investigate Pennsylvania’s Act 13 and its role in facilitating mineral extraction from the Marcellus Shale in

the United States by preventing local government control over zoning arrangements for natural gas, noting that law is a powerful instrument of State authority, with significant capacity to shape the social and legal spaces that extractive industries operate in. Australia has yet to be served by similar studies. Much of the popular literature devoted to both coal and UG development in Australia is focused on the individual experiences of landholders, with a particular emphasis on the efforts of various communities to negotiate (successfully or otherwise) with governments and private corporations (e.g., Cleary, 2012; Manning, 2012; Munro, 2012; Pearse *et al.*, 2013). Although the stories revealed are often compilations of news reports and all too frequently utilised for explanatory power rather than critical analysis, there are still numerous glimpses into issues that are a legal geographer's stock and trade: the interconnections between space, society, and power.

The above popular accounts are regularly cited within the Australian academic literature (e.g., Sherval and Hardiman, 2014). Similarly to the work of popular authors, academic commentators frequently utilise the near-constant media outpourings surrounding both coal and UG extraction in Australia (e.g., Galloway, 2012; McManus and Connor, 2013). However, the intended audience of a specialist journal may obviously be quite distinct from a journalist's readership. As an example, the anti-CSG organisation Lock the Gate has figured prominently in much of the Australian literature, yet their organisational materials are only gradually becoming the subject of critical discourse analysis, highlighting the extent to which this social movement distinguishes itself from not only CSG companies, but also the 'growth first' message of the Queensland Government (Mercer *et al.*, 2014). Australian commentators have also shown an interest in gauging community perceptions of natural resource extraction and their capacity to influence social identity (e.g., the linking of concerns about land rights with cultural understandings of the landscape, see Lloyd *et al.*, 2013). Others have sought to critique the legal infrastructure of both SG and CSG in Australia, with some international comparisons being made (e.g., Hunter, 2011; 2014; Swayne, 2012).

One means of expanding the range of legal geographies displayed in UG disputes is to explore how other disciplines have interpreted the social impact of mineral extraction, such as

the prevention of criminal activity in mining camps, currently a key focus for criminologists (e.g., Carrington *et al.*, 2011). Although not without data collection obstacles, the distribution of assault offences, or the dynamics of private security contractors acting in a policing function are questions for legal geographers to consider. Doing so may contribute to broader Australian and US studies concerning the clout (or otherwise) of physically distant law enforcement agencies in rural settings (Millner, 2011; Pruitt, 2014).

Distance between land uses is clearly an important part of the UG literature (e.g., Fry, 2013), but the concept of scale is also particularly relevant as a gauge of social licence for extractive industries at local and regional levels. In Australia, Lacey and Lamont (2014) have pondered the spatial nature of over 4000 Landholder Access Agreements between landholders and CSG operators in Queensland (*Petroleum (Production and Safety) Act 2004* (Qld), ss 533–534), questioning whether or not these contractual arrangements – which are functionally akin to an easement (Christensen *et al.*, 2012) – are truly reflective of a broader social licence to operate. Even where an Agreement is successfully negotiated, community doubts may linger, because these documents are more akin to one-off business deals than a broader social contract (Manning, 2012; Lacey and Lamont, 2014). In addition to negotiation dynamics (Liss, 2011), these agreements with CSG operators expose social and cultural issues in community relationships with CSG operators. The extent to which these are resolved in legally binding contracts is only beginning to be explored by researchers (Trigger *et al.*, 2014), presenting a knowledge vacuum in the literature for legal geographers.

Judicial interpretations of time and geography may also be relevant in discussions between landholders and CSG companies: particularly where it serves as grounds for judicial review of government decision making. In 2011, QCLNG Pipeline Pty Ltd was engaged in negotiations with the landholder Michael Baker to install a CSG pipeline across a portion of his property at Eidsvold in the North Burnett region of Queensland. This was part of QCLNG's larger endeavour to construct a CSG pipeline from the Surat Basin to the industrial port of Gladstone in central Queensland. QCLNG's failure to provide Baker with an appropriately scaled map of the property that would be used for the pipeline was found to be a denial of procedural fairness.



Procedural fairness is a fundamental concept of administrative law and revolves around the idea that a person who might be adversely affected by an administrative decision must be given a fair hearing before a decision is made. In this case, procedural fairness referred to Baker being given sufficient information by QCLNG to be able to participate meaningfully in the decision-making process and also being permitted a reasonable opportunity to respond to QCLNG's pipeline application before a decision was made by the Queensland Department of Natural Resources and Mines. Because Baker lacked a sufficiently precise map of QCLNG's pipeline route through his property and was not given accurate information in sufficient time to respond to QCLNG's application to the Department, Justice Dalton concluded Baker did not receive procedural fairness, ruling that the Department's decision to grant QCLNG access in that particular location was void (*Baker v Minister for Employment, Skills and Mining & Another*, 2012). In this instance, judicial understandings of time and space converged with legal consequences for the parties. Although only one judgement, it demonstrates that litigation case studies are an important way for UG researchers to analyse both the temporal and spatial elements of this industry, by investigating legal interpretations of geographical concepts, such as scale (Valverde, 2014). This approach could widen the current focus of the Australian UG literature beyond case notes aimed at legal professionals (e.g., Geritz *et al.*, 2012) and reach an audience critiquing other aspects of the sector (including public participation and information-sharing).

As shown above, the manner in which land use agreements are enacted by stakeholders or contested between them is a subject of ongoing deliberation. Recent judicial findings from the Queensland Court of Appeal sought to clarify the types of remedies available to landholders who are not able to successfully negotiate a Conduct and Compensation Agreement with CSG companies. In *Australia Pacific LNG Pty Ltd v Golden* (2013), Justice Muir ruled that accessing alternative dispute resolution remedies to secure a Conduct and Compensation Agreement, in this case through arbitration, was not possible without both parties consenting to use this form of negotiation (Hough, 2014; Plumb and Shute, 2014). As legal spaces are founded upon 'contested social practices and material realities', litigation has a crucial role to play in the process of maintaining and reworking of space (Jepson,

2012, 616). Landscapes are in many ways legal performances, with law acting as a fusing agent between place and identity (Howe, 2008). Litigation is an integral component of this performance, and further research is warranted given the extent of these agreements with landholders.

Benson (2014) builds on this idea by suggesting that the internal 'rules of engagement' surrounding formal litigation (e.g., standing) are in themselves another facet of 'everyday' legal geography, veiled though they may be in procedural 'neutrality'. There are certainly many ways in which standing can be analysed in Australia, particularly given its range of applications in recent decades (Douglas, 2006). As an important filtering mechanism in the litigation process, standing is a rule that may involve 'sacrificing the rule of law, and the protection of individual and corporate interests at the expense of collective interests' (Douglas, 2006, 22). An absence of standing could also limit community objections to SG development in Tasmania (Ryan, 2014). Given this tension, analysis of standing rules from a geographical standpoint could assist in discerning the possibilities of a distinctly 'Australian legal geography' (Bartel *et al.*, 2013). Accepting that the 'everyday' aspects of litigation are an underutilised component of the legal geography literature (Benson, 2014, 218), these 'rules of engagement' can be seen through the prism of UG disputes in Australia. For example, the New South Wales Office of Coal Seam Gas recently decided to suspend their approval for the company Metgasco to drill an exploration well at Bentley near Casino in the Northern Rivers region of the state, 'on the basis that the company was not in compliance with its community consultation obligations' (New South Wales Office of Coal Seam Gas, 2014). Metgasco has responded in turn by seeking judicial review of the suspension (Metgasco, 2014a; 2014b), therefore there may be an opportunity to combine the growing literature around the importance of community engagement in CSG developments with legal analysis of conditions attached to an exploration licence (ABC News, 2014d).

Another example could be an examination of the rule of evidence known as 'discovery'. Although a seemingly benign mechanism for ensuring that all parties exchange relevant documentation prior to the closing of litigation proceedings, when the rule's adversarial context is acknowledged, it may also assume contested meanings. The instrument of discovery may be both a step towards answering questions of

possible contamination of water bores near the Pilliga State Forest in the public interest for the people of New South Wales (the view of the NSW Environmental Defenders Office), or serve, according to the company Santos, as an irrelevant data-gathering exercise for potential litigation in the future (EDO NSW, 2014; Herbert, 2014a). Differing interpretations are of course at the heart of the law's operation, with lawyers serving as both translators and creators of legal language and everyday discourse (Sugarman, 1994).

Beyond land access concerns, the impact of CSG operations on the real estate market in New South Wales has attracted media (ABC News, 2014a) and academic commentary (Fibbens *et al.*, 2013; 2014). Speaking on the Hunter Valley real estate market recently, the State Valuer General, Phillip Weston, stressed the challenges of determining the causes behind property sale delays, on account of both coal and CSG development in the region. Weston acknowledged that the immature nature of the CSG industry in NSW also made this type of research difficult but confirmed that: 'There seems to be some anecdotal evidence from property professionals there has been some changes in terms of the length of time it's taking for properties to sell' (ABC News, 2014a). For Fibbens *et al.* (2013; 2014), there remain ongoing questions surrounding the compensation regime of the *Petroleum (Onshore) Act 1991* (NSW) as raised by CSG extraction. The occupation of land by CSG operators is not equated with acquisition of freehold title, but a company's operations require access arrangements between themselves and landholders that 'tie up land for the term of occupation', an inherently uncertain length of time, ranging from 20 to 40 years on some estimates and subject to the economic viability of the resource itself (Fibbens *et al.*, 2013, 5).

Drawing on compensation and valuation theory, Fibbens *et al.* (2013) argue that the New South Wales legislative framework for mining operates on a preconceived notion that all exploration activities are temporary (*Petroleum (Onshore) Act 1991* (NSW), s 107), thereby affecting the manner in which compensation is considered. They find the legislation wanting on several grounds, including loss of business goodwill and special value (land having value to an owner due to some 'attribute or use made of the land') (Fibbens *et al.*, 2013, 7, 11–12). Given media coverage of CSG exploration and its possible influence on tourism numbers (Schweinsberg and Wearing, 2013), could nega-

tive publicity prompt a law reform argument for loss of business goodwill (Fibbens *et al.*, 2014)? Other openings for discussion are raised around the impacts of access agreements and CSG infrastructure, with potential for qualitative and quantitative studies into the affects of CSG development on property values (Fibbens *et al.*, 2013).

Internationally, SG development presents its own series of 'what if?' scenarios for US valuers (Lipscomb *et al.*, 2012). Despite cross-fertilisation potential, Kedar (2014) has described the dearth of comparative research outputs from legal geographers as a significant challenge for the field. Attempts at a comparative approach are clearly not without difficulties. For example, a US study of landowner coalitions seeking to collectively bargain with natural gas companies to draw up legally binding leases seems unlikely to find an Australian equivalent (Jacquet and Stedman, 2011), because mineral subsurface rights in the United States, unlike the situation in Australia, are primarily held by private landholders. The global distribution of legal geography researchers presents another challenge, with scholarly efforts largely confined to precedent-focused common law countries – leading to a methodology bias against code-based civil law traditions (Villanueva, 2013, 36; Kedar, 2014). However, the use of moratoria by state governments in both the United States and Australia to prevent and postpone UG development is one fruitful comparative pathway, with only limited critique of moratoria in New York State (Simonelli, 2014) and mixed media coverage in Australia (e.g., King *et al.*, 2013; McGauran, 2013; Carter, 2014). Any comparative research would need to acknowledge differing political contexts, with some countries more wary of UG development than others (Becker and Werner, 2014). Comparing Australian and Indonesian legislative responses to a growing UG industry is another possibility (for an Indonesian perspective, see Godfrey *et al.*, 2010). It is also worth pointing out that geographers have already shown some of the potential rewards for posing comparative questions, for example, through the relevance of competing cartographic interpretations for offshore oil and gas negotiations between Australia and East Timor (Nevins, 2004). Aside from international comparisons, additional insights into the Australian legal geography of UG would be gained from key professionals, such as town planners and legal practitioners.



### Legal practitioner perspectives

Socio-legal researchers have long recognised that lawyers occupy a privileged, multifaceted position in society, as both officers of the legal system and an all-important link between the courts and the wider population (Ingleby and Johnstone, 1995). Their capacity to engage across these arenas can be seen in the realms of policy reform, legislative drafting, and litigation advocacy – often with blurred distinctions (Tomasic, 1978). Geographers have recognised that law is ‘too important to be left to the lawyers’ (Friedman, 1986, 780), but researchers have remained reluctant to engage systematically with the profession. Nonetheless, legal professionals exert considerable influence as ‘constituents of landscape’ (Martin and Scherr, 2005, 379). In wider socio-legal research, members of the legal profession have offered their voices to substantiate research questions in the past. Occasionally this has taken on a geographical component, as seen in Smith’s (2006) study of Australian criminal defence lawyers and their motivations for representing the unpopular. Others have considered the impact of geography as a factor in the transplantation of legal precedent among Australia’s state courts (Smyth and Mishra, 2011). These studies could well be considered cases of legal geography in all but name, as many authors would not see themselves as legal or geography practitioners (Blomley, 2003a).

Although the perspectives of legal practitioners can be seen in a variety of sources relating to UG in Australia, from interviews with the media (Locke, 2014), Parliamentary inquiries (De Rijke, 2013a), legal determinations (Plumb and Shute, 2014) and professional journals (Christie, 2012), as a group, legal practitioners are not generally seen as influential actors in directing the outcome of land-use disputes. This is despite their often central place in attempting to resolve contested legal and political claims (Martin *et al.*, 2010). They can do this by deploying arguments and language against judges in order to persuade and create physical effects upon the world (Delaney, 2010).

Despite this recognition, Deborah Martin *et al.* have correctly identified that both lawyers and ‘the practice of the law’ are generally missing from the growing output of the legal geography project (Martin *et al.*, 2010, 176). Viewing lawyers and judges as ‘nomospheric technicians’ (Delaney, 2010, 158, 159) is one means of analysing legal professionals and their litigation/adjudication strategies through a legal geography

framework. The ‘nomosphere’ is derived from *nomos*, Greek for law, and refers to ‘the cultural–material environs that are constituted by the reciprocal materialization of “the legal”, and the legal signification of the “socio-spatial” ’ (Delaney, 2010, 25). ‘Nomospheric technicians’ are actors within the nomosphere, namely lawyers and judges, who advance their goals by various tactical means (Delaney, 2010; Benson, 2014). This term is an element of Delaney’s wider nomospheric investigations research and a response to Nicholas Blomley’s earlier call for researchers to create a conceptual language ‘that allows us to think beyond binary categories such as “space” and “law” ’ (Blomley, 2003b, 29–30). For Delaney, the ‘nomosphere’ amounts to ‘the cultural-material environs that are constituted by reciprocal materialization of “the legal” and the legal signification of the “socio-spatial”, and the practical, performative engagements through which such constitutive moments happen and unfold’ (2010, 25). Applying his concept to legal professionals, or ‘technicians’ of the nomosphere, Delaney links the actions of these key actors with changes in geographical space:

[W]hat nomospheric technicians do can be thought of as a kind of fabrication process, where raw materials are brought together and worked on, and which results in the construction of nomospheric *world-models*. These . . . representations are fabricated in order to be presented in ritual, institutional settings to other nomospheric technicians (judges). The job of judging essentially entails the assessment of the relative merits of contending world-models according to a range of criteria. Judges disqualify one, and validate another . . . These arguments as world-models are not offered [by lawyers] for the purposes of contemplation or admiration. They are designed to have cognitive and affective effects on judges and practical effects in the world. They are pragmatically fabricated *in order to* persuade—to cause an empowered state actor to see the world in a particular way [and act accordingly]. (2010, 159–160. Emphasis in original.)

As a new development in the literature, it may be some time before the potential of legal practitioners as a research source is fully realised. Although acknowledging that Martin’s challenge should be responded to, possibly through the lens of Delaney’s world-making nomosphere, there is even greater scope to include individuals from all

levels of legal practice in this analysis, not just lawyers: from law students to judges, legal academics, in-house company counsel, and bureaucrats. This is illustrated by the public unease associated with CSG development and competing community narratives of place in rural centres (e.g., Sherval and Hardiman, 2014). As noted above, the perspectives of individuals involved in the legal process are to be found in many places, from media coverage of self-represented litigants recalling their experiences in the Queensland Land Court (Calderwood, 2014), popular texts on coal development in Australia (Manning, 2012, 10; Munro, 2012), industry journals containing commentary on the latest regulatory developments (Plumb, 2013; Brockett, 2014; Hoare *et al.*, 2014), speeches, policy submissions, and scholarly articles by judges and barristers (e.g., Christie, 2012). Then there are the more obvious contributions of legal judgments and draft legislation. Geographers and legal commentators have themselves utilised the power of interviews for their own research, enriching their analysis beyond purely regulatory matters in the process (Sherval and Graham, 2013). Keeping an open mind as to the all-encompassing impact of legal relations is beneficial to the researcher, as clearly lawyers are not the only professional group responding to the challenges of UG, with many other active participants, such as town planners, bureaucrats, land valuation experts, and police.

Beyond individual actors, legal structures are bound more generally to community understandings of a nation's cultural heritage. Australia's legal history and the contemporary conditions of Indigenous Australians are not necessarily new ground for legal geographers (Bartel *et al.*, 2013), but integrating these issues into the broader context of extractive industries in Australia is another potential area for researchers to explore.

### **Legal history and contemporary Indigenous perspectives**

Political campaigns surrounding contested land uses are not a new phenomenon in Australia. As the latest resource to court controversy, the exploitation of UG offers historically minded legal geographers the opportunity to reflect more critically upon competition between private property interests. Although CSG development in particular has been credited with altering previously held community beliefs about State ownership of mineral resources (Organ, 2014), this

'modern property law conundrum' (Weir and Hunter, 2012) has an historical twist:

Ironically, the exercise by miners of CSG rights is in direct contrast to the mining industry's widely publicised untruthful objections to native title following the *Mabo* and *Wik* decisions [in 1992 and 1996 respectively]. Aggressive national campaigns were run at the time, warning freehold landowners of the threat that native title posed to the maintenance and exercise of private property rights. Native title, that most fragile of all property rights, was never contemplated as being in competition with freehold title in spite of the miners' claims. In contrast, CSG rights directly and explicitly collide with what . . . [Blackstone called] 'the highest and most extensive interest that a man [*sic*] can have' in land. (Galloway, 2012, 79)

Indigenous Australians have certainly featured strongly in critiques of the mining industry (e.g., Cleary, 2012; Pearse *et al.*, 2013). They may also have a significant role to play in discussions around UG in Australia, depending on drilling locations. A future example of this may potentially be seen at Mount Mulligan (Nguddaboolgan), 100 kilometres west of Cairns (Figure 1). An impressive natural landmark of sandstone cliffs, coal deposits beneath the mountain supported a mining community from 1914 to 1958. Entering a new phase as a cattle property (Bell, 1978), it now serves as an eco-tourism operation following a recent purchase at auction (North Queensland Lock the Gate Alliance Affiliate Group, email 13 October 2014). Mount Mulligan is also entrenched in North Queensland folklore as the scene of Queensland's worst land disaster, a massive coal dust explosion on 19 September 1921 that resulted in the deaths of all 75 men and boys working underground (Bell, 1978; 1996; 2013). Significant for its Indigenous prehistory, archaeological evidence of human habitation in rock shelters of the mountain date to 37 000 years (Bell, 1996).

From 1991, Mount Mulligan was owned by the Western Yalangi Aboriginal Corporation and leased to the Queensland Department of Environment and Heritage as the Kuku Djungan Nurrabullgin National Park (Bell, 1996). In August 2012, the Djungan people were granted native title interests over the site by the Federal Court, permitting them exclusive use of approximately 149 915 hectares in and around the mountain (*Archer on Behalf of the Djungan People #1*

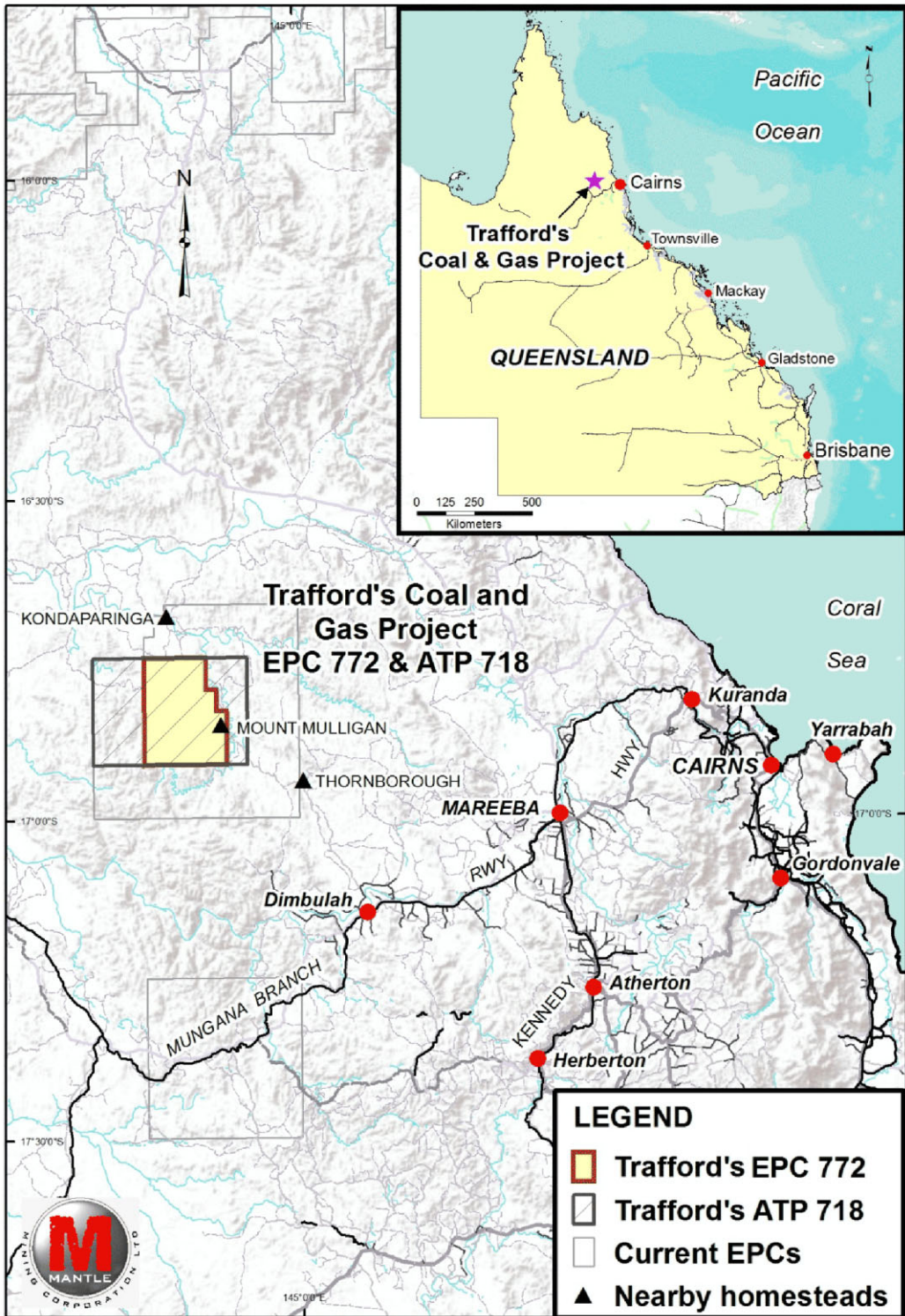


Figure 1 Map of Trafford Project. Source: Mantle Mining Corporation (2014a, 7).



*v State of Queensland*, 2012; Queensland Government, 2012). The area is once again generating interest due to a coal exploration licence being granted to Mantle Mining Corporation, a Perth-based company, in 2008. The area may also be the subject of future CSG exploration, with Mantle Mining's application presently under consideration with the State Government (Nancarrow, 2014). The company's initial 4-year coal exploration permit was recently extended by the State Government to 4 December 2015 and relates to a 5500 sq km area surrounding Mount Mulligan. Initially, an Indigenous Land Use Agreement was executed with the Djungan people, who formed a Coordinating Committee to work with Mantle Mining to progress exploration plans and manage Indigenous cultural heritage (Mantle Mining Corporation, 2012; 2014a; 2014b). This Committee had a leading role in finalising a Conduct and Compensation Agreement that was entered into by the Djungan people and Mantle Mining in November 2013 (Mantle Mining Corporation, 2013).

In a place alive with legends and cultural heritage – dealing with both the disaster (Bell, 1979–1980) and the origins of the mountain itself in Indigenous oral tradition – the extension of Mantle Mining's coal exploration licence and potential for CSG operations has caused some consternation. Traditional owners held a public meeting at Mareeba on 28 May 2014, to discuss the company's intended operation – expressing concern at the potential for contamination of underground aquifers and urging Mantle Mining to negotiate with them to secure an access agreement (Cluff, 2014; Reghenzani and Vlastic, 2014). With presentations from visiting residents of Chinchilla, solicitors from the North Queensland EDO, Federal and State politicians and key members of Lock the Gate, further discussion is planned (Nancarrow, 2014; North Queensland Lock the Gate Alliance Affiliate Group, email 9 June 2014). Whether this represents the type of contractual agreement versus social licence conundrum suggested above by Lacey and Lamont (2014) remains to be seen.

This brief overview hints at how sites such as Mount Mulligan present possibilities for researchers examining UG development in a local Australian context. As landscapes are partly influenced by community perceptions of the law, the manner in which the UG industry is implemented may vary between localities, notwithstanding the legislative intent of central government (Jones, 2006). Legal analysts concerned

with access to justice challenges for rural and remote Australian communities have acknowledged the wider role of geography in determining both the choice and costs associated with obtaining legal counsel and environmental experts (e.g., Millner, 2011). However, this 'tyranny of distance' and resources remains an underexplored area from a UG standpoint. Researchers may choose to consider this further, with rural areas arguably distanced – both physically and socially – from the 'force of the state' as a source of legal order (Pruitt, 2014, 190). Consequently, negotiations across multiple scales and jurisdictions are commonplace.

### Scale and spillover

The spatial and categorical obsessions of both law and property have been recognised by legal geographers for some time (e.g., Dorsett and McVeigh, 2002; Blomley, 2005). Extractive industries are also notable for their ability to affect regions in a spatially uneven manner, with the law serving as an instrument in this process of social construction (Haas, 2008b). If the notion of jurisdiction is understood to be 'law's territory' (Ford, 1999), then the use of legal authorities as a protest strategy against coal and CSG development by Lock the Gate, for example, presents another research question for legal geographers (Figure 2). Illustrating this most clearly, the High Court's decision in *Plenty v Dillon* involved the failure of two police



Figure 2 Invoking boundaries as a protest strategy. Source: Lock the Gate Alliance (2014).

officers to provide a search warrant to Plenty before entering their premises. The High Court's finding of trespass against the police, in the absence of lawful authority to enter on to Plenty's property, seems far removed from Lock the Gate's efforts to halt mining operators who have been granted licences by the State (1991, 635). However, this has not prevented the symbolic use of the Court's decision on signs by anti-CSG protestors; combining a physical barrier with a jurisdictional challenge. Social spaces and boundaries are of course 'saturated' in legal meanings and often subject to 'divergent interpretations' (Delaney *et al.*, 2001, xviii). The symbolic politics of property is a theme to be found across the world and is not limited to extractive industries (e.g., Blomley, 1998; Brower *et al.*, 2009). In addition to being a ubiquitous presence in the world (as Austin Sarat famously observed: 'law is all over', quoted in Delaney, 2003, 67), law is also a tool through which protest action can be mobilised for particular ends.

The extent of law's reach in society makes it an attractive weapon for protest groups, yet its deployment remains contingent upon geographical context (Akinwumi, 2012). Interpretation and prioritisation of different geographical scales can be relevant for framing community dissent and ultimately the legal basis for development approvals (Jessup, 2013). Jurisdictional choices by regulators can also be a source of dispute, as farmers in the Pilliga Forest region of New South Wales recently discovered, after the CSG operator Santos was fined \$1500 by the NSW Environmental Protection Agency for failing to prevent a uranium spill into a local aquifer – a leakage found by Santos itself and reported accordingly. Although the regulator also imposed a pollution reduction programme upon Santos, forcing the company to improve monitoring and remediation infrastructure at the site, for some observers this was not a sufficient penalty, leading to questions about its regulatory approach: '[F]armers and environmental groups say the EPA has failed its charter. They say if Santos had been forced to go before the Land and Environment Court, it could have been liable to penalties of up to a million dollars' (Cornwall, 2014).

It is stressed that the law's geographical impact can be shaped by any number of stakeholder perspectives, not just those who protest the existence of the UG industry. The spatial extent of the sector has been noted widely in the literature, both

within Australia and overseas (e.g., Stedman *et al.*, 2012; Measham and Fleming, 2014). Less attention has been directed to stakeholder efforts to mould the State's regulatory response to this expansion. For example, alleged lobbying by the resource company Santos to modify the geographical range of a then draft New South Wales Strategic Regional Land Use Policy (released in 2012) suggests there is more to be said about how regulatory choices regarding the industry are made and what influences may underpin them (Lamacraft, 2014).

Landholders have demanded the legal right to refuse entry to CSG operators at a Parliamentary level (Galloway, 2012) but seem to have had more success with their argument when particular companies have declared that they will not seek to establish themselves where they are deemed unwanted (e.g., the land access agreement reached between Santos, AGL, the NSW Irrigators Council and Cotton Australia in March 2014: Herbert, 2014b, see also the subsequent discussions between Dairy Connect and AGL at Gloucester in New South Wales, ABC News, 2014c). These industry arrangements can of course be seen as an effort to construct a social licence to operate and avoid reputational damage to a company's image (Tuck, 2012), but the protest strategy itself has not (as yet) resulted in formal legal change by government. The spatial presence of protests against CSG development can also be found in the local government approvals for protest camps – as demonstrated by the non-renewal of a permit to expand a protest camp at Bentley, New South Wales. As explained by the Richmond Valley Council, existing uses of the landscape and public health concerns were key considerations: '[Their] application . . . has been opposed by people who have a fairly strong influence, such as the police . . . R[oads and] M[aritime] S[ervices] and our planners themselves . . . It unfortunately is not of an appropriate quality and the proposed use will not be approved' (ABC News, 2014b).

The above shows that in defining the boundaries and uses of landscapes, some specialist groups have considerable power. For example, despite the fact that local government in Australia is generally perceived to be excluded from decision-making processes around UG (De Rijke, 2013b), their role may be of increasing relevance given the use of referendum-style polling on CSG developments in local government areas (Luke *et al.*, 2014) and attempts by some councils to 'lock the gate' to CSG operators

(Robertson, 2014). UG extraction raises jurisdictional questions that traverse far more than compensation, land access, and environmental harms – partly because of its relatively short commercial existence in Australia (Keogh, 2013). It therefore has the potential to create new legal frontiers.

## Conclusion

As shown above, there are many ways in which legal geography might contribute to the ongoing public debate in Australia around UG extraction. Researchers may choose to approach this challenge by studying the types of legal actors involved, their choices, spatial interpretations, arguments, and the influence of their expertise upon regulatory decisions. Alternatively, ongoing CSG development presents opportunities for companies attempting to achieve community social licence via contractual agreements with individual landholders, and for the use of boundaries as a protest strategy to counter such efforts. The physical extent of regulatory measures may also be influenced by lobbying from any number of interested parties, including Indigenous people. In the search for extractive models, further analysis of the comparative type undertaken by Hunter (2014) is warranted to assess whether Australia's regulatory regimes are appropriate for the minimisation of social, economic, and environmental costs. This is no easy task where energy law and policy is concerned. With both 'unique and universal truths' surrounding issues of compensation, litigation processes, land valuation and Indigenous perspectives (Bartel *et al.*, 2013, 348), Australian commentators are encouraged to compare these questions while addressing their domestic circumstances. Perhaps most importantly, the controversy of UG extraction invites wider questions about resource use and the linkages between space, power, and society as a whole.

## ACKNOWLEDGEMENTS

This research was funded by an Australian Postgraduate Award and a Supplementary Scholarship from the Fenner School of Environment and Society, Australian National University. I wish to thank one of my PhD supervisors, Dr Tom Measham (CSIRO/ANU), for his helpful comments on an earlier draft of this manuscript.

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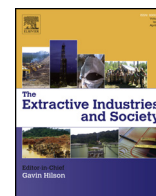


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## **Appendix 3: Published version of Chapter Five – Lawyers in Australia’s coal seam gas debate: a study of participation in recorded community forums**

The published version of David J. Turton, 2015, ‘Lawyers in Australia’s Coal Seam Gas Debate: A Study of Participation in Recorded Community Forums’. *The Extractive Industries and Society*, 2(4): 802-812 is reproduced on the following page.



## Original Article

## Lawyers in Australia's coal seam gas debate: A study of participation in recorded community forums



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## ARTICLE INFO

## Article history:

Received 16 February 2015

Received in revised form 18 June 2015

Available online 2 July 2015

## Keywords:

Coal seam gas

Australia

Lawyers

Legal geography

## ABSTRACT

Seeking to encourage greater scrutiny of lawyers in Australia's coal seam gas (CSG) debate, this paper analyses lawyer–community interaction at six recorded CSG community forums held between 2011 and 2014. Using the concept of a lawyer as a ‘translator’ of client concerns from the legal geography literature and viewing the identified forums as informal exchanges of legal knowledge, it is argued that lawyers informed audience members about land access laws relating to CSG, translated audience anxieties and questions about CSG into legal claims, and framed critiques of CSG laws around personal experiences of the legal process to call for law reform at these forums. Acknowledging the broader context in which these community forums were held, financial and political factors are considered as potentially relevant for driving the involvement of some lawyers in forum speaker panels, noting the apparent absence of CSG industry legal representatives from all recorded community forums. Potential future research avenues are also highlighted.

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## 1. Introduction

In recent years, the coal seam gas (CSG) industry has been a prominent feature of media headlines and political debate in Australia (e.g. Manning, 2012), particularly in the eastern States of New South Wales and Queensland. Coal seam gas, also known as coal bed gas, is a source of methane found in underground coal seams (Williams et al., 2012). Support for its development is partly due to a need to reduce rising greenhouse gas emissions caused by the use of fossil fuels, such as oil and coal. As the largest sources of energy for humans globally, on some calculations it is claimed that coal and oil ‘produce 1.4–1.75 times more greenhouse emissions than natural gas’ on a lifecycle basis (Barnett, 2010: 1). Some observers therefore view CSG as a step towards a necessary transition to low and zero carbon-emitting energy sources (Barnett, 2010). The possibility of fugitive methane emissions from CSG production may diminish the potential greenhouse benefits of this resource, but currently incomplete information and inconsistent assessment measures complicate research findings on this question (Day et al., 2014; Vickas et al., 2015). These scientific investigations are of great significance, given the need for appropriate CSG regulation and the extent to which this might be challenged in the future through climate change litigation, as

has occurred with other fossil fuels both internationally and domestically (Osofsky, 2011, 2013; Peel, 2007).

Critiques of CSG from across the physical and social sciences generally highlight its economic potential or argue that the industry should be extinguished on the basis of negative social and environmental impacts (Lave and Lutz, 2014). Others favour a cautious approach to the industry's expansion in view of potential cumulative risks to water aquifers and surface ecosystems as a result of CSG extraction processes and the placement of associated infrastructure, among other concerns (Randall, 2012; Tan et al., 2015). Despite academic interest in the activities of the anti-CSG social movement Lock the Gate, an alliance between environmentalists and farmers in Australia against coal and CSG development (Lloyd et al., 2013; Mercer et al., 2014; Kutch and Titus, 2014; Colvin et al., 2015), similar scholarly attention has not been extended to the nation's lawyers. A lack of targeted research into the involvement of lawyers in CSG issues may be the result of a researcher preference for speaking with parties directly affected by the industry (rather than their agents), or a perception that ‘legal studies and business scholars tend to take neutral or positive stances towards fracking, and [appear] to ignore questions of fracking's potential environmental or social harms’ (Lave and Lutz, 2014: 746). Such ‘neutrality’ may be off-putting to some researchers, who are perhaps better acquainted with the broader social science literature concerning CSG, which is often laden ‘with claims that fracking has intensely negative environmental impacts’ (Lave and Lutz, 2014: 745).

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This article challenges such views by arguing, through the study of six recorded community forums, that an individual's legal expertise and social values are pertinent for their interactions with the wider community and potentially also the legal system – informing and influencing those around them: from law students (Hamman et al., 2014), to university legal educators (Graham, 2014; Carruthers et al., 2012; Author interview with Kate Galloway, 2014; Author phone interview with Dr Chris McGrath, 2014), government regulators (Hanson, 2011), industry and social movements. The term 'fracking' is itself subject to various connotations that have not gone unnoticed by lawyers in the United States, with at least one senior attorney in the Natural Resources Defense Council observing that: '[Fracking] obviously calls to mind other less socially polite terms, and folks have been able to take advantage of that' (Quoted in Evensen et al., 2014: 130; see also House, 2013). Law may be 'too important to be left to the lawyers' (Friedman, 1986: 780), but this does not mean that these socially privileged actors should be ignored in CSG analyses, given their involvement in so many aspects of this controversial resource. Individuals with legal training are not usually thought of as key actors in the social construction and contestation of landscapes (Blomley, 2014), but are nonetheless deeply implicated in shaping land use claims (Delaney, 2003). It is worth noting that the influence of lawyers has been interrogated fruitfully in many other contentious settings, such as wind energy lobbying (Songsore and Buzzelli, 2014; Dobliger and Soppe, 2013), carbon markets (Lovell and Ghaleigh, 2013), and urban planning arrangements (Davies and Atkinson, 2012).

As Turton (2015) has outlined, indications of the involvement of lawyers in Australian CSG developments can be gleaned from a wide array of sources, including: parliamentary deliberations, government inquiries, legislation, court judgements, media reports, regulatory updates on law firm websites, as well as law and industry journals. Blogs authored by lawyers can be added to this list (Aidan Ricketts, 2015; McCullough Robertson, 2015). Lawyers have a significant input into CSG discussions across several platforms extending from academic commentary, to litigation advocacy, law reform, drafting legislation and their broader participation as concerned members of their community. Despite recognition of the blurred multiplicity of their roles in the socio-legal literature (Sugarman, 1994), and their strong presence in commentary surrounding CSG so far, lawyers themselves have not – as a group – been subjected to intensive analysis. While legal commentary relating to CSG is readily accessible to researchers (e.g. law journals and court judgments), it is important to recognise that wider socio-legal understandings of 'the law' encompass not only how it is represented in these official legal texts, but also how lawyers, lay people and social groups engage with, think about and contest legal concepts, formal law and legal ideologies (Barkan, 2011; Chouinard, 1994). Given that 'law is lived' (Chouinard, 1994: 432) and interpreted by people through everyday exchanges in society (Darian-Smith, 2013), there is merit in investigating how legal information about CSG is imparted to the general public by lawyers in Queensland and New South Wales through relatively informal settings, such as the community forum.

Seeking to challenge Lave and Lutz's (2014) claim that legal commentary on unconventional gas is 'neutral' in much of its tone, this paper will examine how lawyers at six recorded CSG community forums relayed information about CSG laws as well as rhetoric about this resource, both in their presentations and in response to forum audience questions. Community CSG forums constitute informal engagements between the public and lawyer forum speakers, serving as occasions when so-called non-legal actors were drawn into the practice of the law (Jeffrey, 2011). Using the lens of legal geography – a stream of scholarship that seeks to explore how law is shaped by space and vice versa (Braverman

et al., 2014) – it is argued that lawyers informed forum audience members about land access laws relating to CSG, responded to audience anxieties and questions about CSG by translating them into useable legal claims, and drew upon personal experiences of the CSG legal process to frame their calls for law reform at these forums (Martin et al., 2010). Reference is also made to publicly accessible media sources where relevant to illustrate the wider political and financial context of lawyer involvement in CSG disputes – suggesting its potential relevance to lawyer participation in community forums, with the absence of CSG industry lawyers from available recorded forums being acknowledged as a significant research gap.

As a controversial land use, CSG is fraught with data collection challenges for researchers and Section 2 discusses the reasons for relying primarily on recorded community forums and publicly accessible documentary sources rather than interviews with lawyers. After noting literature that addresses the place of lawyers in mediating between mining corporations and communities in Section 3.1, theoretical insights from legal geography briefly noted above are explained further. Analysis of the six recorded community forums will then follow in Section 4, with a short background provided on their content in Section 4.1 before focussing on land access issues raised in the forums in Section 4.2. While the author cannot claim to offer a complete picture of the myriad interactions between lawyers, the general public and CSG – providing only a snapshot of one of the spaces occupied by this profession and this contested resource – potential areas for future research are noted, as are data collection obstacles.

## 2. Methods

Legal geography is a sub-discipline seemingly bereft of a common methodology (Delaney, 2015). This is partly a reflection of its disciplinary origins, as many legal geographers have been trained in the discipline of the law – which is arguably 'not as reflective as many other disciplines about its methods' (Braverman, 2014: 122; Fisher et al., 2009). However, there is growing recognition that discussing methodological choices is worthwhile in order to expand the horizons of legal geography (Braverman, 2014). Therefore, this research commenced with an acceptance of the diverse range of roles performed by lawyers in Australian society, drawing on Tomasic's typology (1978), who conceived lawyer functions and associated lawyer occupations as falling into particular 'types': advocate (criminal lawyer), technician (academic lawyer), manager-planner (tax lawyer), holder of knowledge (commercial lawyer), advisor (corporate counsel), public servant bureaucrat (parliamentary counsel), investigator (litigation lawyer) and manipulator of situations (legal aid lawyer). Notably, an overarching definition of a 'lawyer' is elusive, beyond perhaps the unifying feature of all individuals holding legal qualifications (Howarth, 2013; Lovell and Ghaleigh, 2013). Some individuals would also wear several hats in Tomasic's typology.

With a broad conception of the activities performed by lawyers in mind, a search was made for publicly accessible CSG community forums featuring contributions from lawyers. The search parameters have necessarily meant that some forums were excluded from analysis, by virtue of not being recorded, or having no accessible transcript (Anonymous, 2011b). A total of six recorded, publicly available community forums were found using combinations of the following search engine terms: 'forum', 'seminar', 'meeting', 'CSG', 'coal seam gas', 'legal', 'lawyer', 'judge', 'solicitor' and 'barrister' (Australian Earth Laws Alliance, 2012; Independent Coal Seam Gas Science Forum, 2014; Centre for Rural Regional Law and Justice Deakin University and the Environmental Defenders Office, 2014; Clarence Environment Centre, 2012; National Parks Association of NSW, 2011a,b; Conservation Council SA, 2011). It is



stressed that promotional material for some unrecorded community forums indicates a lack CSG industry representation (legal or otherwise), or conversely, fails to include any perspectives from anti-CSG social movements (e.g. [ManlyAustralia, 2015](#); [Pro Bono Australia, 2014](#); [Anonymous, 2010](#)). In the six recorded forums available to the researcher, lawyers representing the CSG industry were found to be entirely absent ([Australian Earth Laws Alliance, 2012](#); [Independent Coal Seam Gas Science Forum, 2014](#); [Centre for Rural Regional Law and Justice Deakin University and the Environmental Defenders Office, 2014](#); [Clarence Environment Centre, 2012](#)), although non-legal industry representatives participated in two instances – with solicitors from the Environmental Defenders Office (EDO) (a community legal centre that has represented community groups challenging CSG developments) also present at the same forum ([National Parks Association of NSW, 2011a,b](#); [Conservation Council SA, 2011](#)). Unfortunately, some community forums were not available in any form beyond prevent advertising, but indicated the intention of having legal representatives from the CSG industry as participants (e.g. [McMullen, 2011](#)). To the best of the researcher's knowledge, at the time of writing it would appear that the views of lawyers for the CSG industry at forums have not been recorded and were therefore unavailable for analysis. The researcher acknowledges that other CSG community forums have taken place and will likely continue to be held in the future (e.g. [Cessnock City Council, 2015](#)). However, only six of these were publicly accessible in a recorded form post-event.

It is unclear why many CSG forums are unrecorded. In view of the CSG industry's underrepresentation, it is clear that additional research will be required to fully assess the views of lawyers representing these stakeholders. The range of lawyer voices contributing to CSG commentary in the public sphere certainly deserves further investigation to assess any discernible trends. For example, are the repeated contributions of some lawyers on CSG issues (such as EDO solicitors) in the media a demonstration of advocacy from a vocal, networked minority (as suggested in other energy disputes, see [Anderson, 2013](#)), an indication of reporting preferences by journalists, evidence of deliberate public communication choices by the CSG industry, or a combination of all of these factors? Due to the aforementioned difficulties of access, the voices of lawyers from the CSG industry can only be inferred through the use of documentary sources in this article.

To partially redress this imbalance and capture related media coverage of CSG community forums, the researcher conducted extensive newspaper searches using the databases 'Factiva', 'Newsbank' and 'Google News'. Gas and legal industry websites such as 'Gas Today' and 'Lawyers Weekly' were also investigated, employing identical search terms to the ones used to locate community forums. While the content from industry websites is generally aimed at the legal profession at large or the gas and mining industries in general – with consequences for the depth of coverage of issues – such sources allowed a deeper understanding of newspaper reports devoted to the EDO's discussion of land access issues and the views of lawyers representing landholders, detailed in Section 4. The literature acknowledges the media's role as a significant disseminator of information about energy issues, including reporting on related matters such as climate change (e.g. [Jaspal et al., 2014a](#); [Jaspal and Nerlich, 2014](#); [Paterson, 2014](#); [Romanach et al., 2015](#); [Speck, 2010](#)). While audiovisual sources have been utilised by other researchers investigating unconventional gas ([Jaspal et al., 2014b](#)), there are certainly risks in drawing upon public media sources, with the potential for bias from any number of angles (e.g. [Paterson, 2014](#); [Foxwell-Norton, 2014](#); [Wheeler-Jones et al., 2015](#)). As with the above community forums, public media sources sometimes fail to include a range of stakeholder interests in newspaper and radio reportage of lawyers

involved in CSG disputes (e.g. [2GB 873AM, 2013](#); [ABC Radio National Law Report, 2013](#); [Anonymous, 2013](#); [King and Bernard, 2013](#); [Lloyd, 2013](#); [Wells, 2014](#)). There is also a tendency in the documentary sources to focus on key participants in the debate for 'profile pieces' (e.g. [Cullen, 2014](#); [Parkinson, 2014](#); [McAlister, 2013](#); [Jacques, 2013](#)) that may not encompass a wide range of views, whether reporting comments about the need for legal advice from those acting for landholders ([Pola, 2013](#)), or the proceedings of a community meeting held for legal education purposes for lawyers and the general community ([Murray, 2013](#)).

The key reason for the study's focus on audio recordings and publicly accessible documentary material is due to a lack of interview participation from lawyers contacted by the researcher. There are many potential reasons for this and the following indicative explanations were experienced by the researcher: a desire to only assist those who were willing to state an anti-CSG stance upfront ahead of the normal weighing of competing claims expected in academic research (Non-Government Organisation meeting November 2014); a refusal to comment as a public servant with expertise in drafting legislation due to a need for professional impartiality and political sensitivities (Pers Comm. with Government Officer October 2014); and a view expressed by a legal professional representing industry that they could not provide an interview due to 'my involvement with the developments you are considering' (Email from Legal Representative September 2014). Other attempts at contact were met with unanswered emails and phone calls. The researcher's efforts to contact industry legal representatives at public events (e.g. a CSG forum held in 2014 with lawyers in the audience) were also unsuccessful. Although two interviews were obtained with university legal educators after ethical approval, as indicated in Section 1 (for details see Acknowledgements and References), these were not sufficient to constitute a representative sample. Previous Australian research involving lawyers connected with CSG has identified similar obstacles ([Hanson, 2011](#)) and it seems likely that this will continue to be problematic for future researchers, although interview access has been granted in some cases (e.g. [Trigger et al., 2014](#)) and lawyers have constituted the principal source of information for other legal geography studies (e.g. [Terry, 2009](#)). Lawyers might in fact benefit from increased engagement with CSG researchers, as their increased participation may be of value to existing law reform efforts by professional law associations that advocate in Australian energy debates (e.g. [Anonymous, 2011a](#); [Queensland Law Society, 2013–14](#)). Finally, where unpublished sources are occasionally referred to ([Bennetto, 2013](#); [Hanson, 2011](#)), information on public access procedures is provided in the References section. Despite the above limitations, extractive industry scholars have not been deterred from incorporating lawyers into their research.

### 3. A legal geography overview

#### 3.1. Lawyers in the literature

Lawyers have been sought out by researchers for their views on selected aspects of CSG, whether for analysis relating to trust and social licence or the preparation of Land Use Agreements by the CSG industry in its engagement with Indigenous Australians ([Trigger et al., 2014](#); [Bennetto, 2013](#)). Others have considered the role of lawyers as a lobbying influence upon government to make changes to CSG-related water legislation on behalf of industry ([Hanson, 2011](#)), or used the observations made by lawyers in the course of government inquiries to craft wider narratives about the Australian CSG sector and contested landscapes ([De Rijke, 2013](#)). In the United States, the efforts of lawyers have been interpreted in the context of lease agreement negotiations between landowners and unconventional gas companies, with lawyers sometimes

acting as a double-edged sword in successful negotiations (Liss, 2011). Similar conclusions have been made by those assessing the community engagement strategies of platinum operators in South Africa, indicating that the use of lawyers can change 'the tone of community engagement... towards a more antagonist and legalistic one, by putting the company on the defensive' (Farrell et al., 2012: 199). Lawyers are recognised as an elite professional group with expertise in navigating adversarial legal systems, enjoying status and privileged access in society as a result (Martin and Scherr, 2005). It is therefore unsurprising that the very presence of lawyers in a social dispute can alter its power dynamics (Martin et al., 2010).

Yet the literature acknowledges that lawyers also have a role to play in finding solutions to community relations issues that arise in the development of unconventional gas projects (Weems and Hwang, 2013). Beyond unconventional gas, the views of lawyers have been noted in research investigating extractive industries in Africa and the Americas (Pozas et al., 2015; Prno, 2013; Wan, 2014). Lawyers are not usually the primary focus of analysis, however, but are often included as part of a broader interview sample that encompasses other professional backgrounds (e.g. Trigger et al., 2014; Willow et al., 2014).

Nonetheless, it is accepted that lawyers are a valuable resource for socio-legal research generally (Tomasic, 1978), partly because of their multi-faceted contributions to both the legal system and society as a whole (Ingleby and Johnstone, 1995). Historical legal silence and marginalisation of Indigenous Australians also presents a noteworthy contrast for at least one mining historian attempting to evaluate CSG development:

[W]hat can be ascertained in 2013 is that the farmers of eastern Australia are better educated, motivated, connected and legally positioned than the Indigenous peoples of... Australia [were] when miners came to acquire their land. [Knox, 2013: 353]

Australia has been fortunate not to suffer from such a dearth of legal expertise in the present era, but it has still proven necessary for government to provide legal aid funding to farmers seeking advice in relation to CSG exploration (Queensland Legal Aid, 2014). An absence of legal expertise may complicate negotiations for industry, who might otherwise purposefully engage locally available counsel in a 'facilitator' role: someone with an understanding of the industry's operational requirements and knowledge of those with whom the company must have dealings (Neumann, 1997: 145–46). Corporate reputation also appears to be a relevant consideration for negotiators. In her study of reputations and property rights in the Australian mining industry, Tuck (2012) highlights the importance of a company's reputation in a community for the purposes of securing social licence and creating and then maintaining favourable property rights to resources. As shown above, the presence of lawyers has been acknowledged in the extractive industries literature, but legal geographers have only recently begun to consider the central role of lawyers in framing claims to places.

### 3.2. *Introducing legal geography*

Focussing on the interconnections between law and spatiality, and their reciprocal construction, legal geographers contend that 'nearly every aspect of law is located, takes place, is in motion, or has some spatial frame of reference' (Braverman et al., 2014: 1). This interaction is of considerable interest to legal geographers, as law and space are treated as relational concepts that obtain meaning through social action (Blomley and Bakan, 1992). Building upon a wider legal geography scholarship (e.g. Bartel et al., 2013; Holmes, 2014; Braverman et al., 2014), an emerging literature in Australia and the United States has recently suggested

ways in which this disciplinary enterprise might contribute constructively to community debates surrounding unconventional gas extraction (Turton, 2015; Andrews and McCarthy, 2014). Legal geographers have also begun to explore the role that lawyers have in exerting influence to bring about physical changes in the landscape (Martin et al., 2010). Lawyers are privileged social actors who make a specific legal sense of the world around them and create particular results by participating in the legal process, by virtue of their productive relationship to the law (Delaney, 2010). Lawyers' specialised knowledge of the law is also used by societal interests to promote competing social representations of space (Mohr, 2003).

Martin et al. (2010) view lawyers as mediators between community concerns over geography, land use, development and the legal structures which may serve to address those anxieties. Belonging to an agency-centred strand of legal geography scholarship (Hatcher, 2010), Martin et al. argue that lawyers, as agents, 'translate meaning from one form to another...[to] interpret and reconstitute their client's claims and concerns into the language of the law' (2010: 176, 188). In addition, the authors argue that lawyers 'transform meaning by incorporating both societal norms and personal values...and exert power, altering existing social relations' (2010: 176). Extending Martin et al.'s (2010) concept of 'translation' beyond direct lawyer-client interaction to encompass CSG forum audiences and the lawyers speaking to them, these community events are regarded as informal exchanges of legal knowledge where community understandings of the laws surrounding CSG are reframed into possible legal arguments by lawyer presenters.

Given that legal geography embraces not only formal laws but also informal rules and social norms (Bartel et al., 2013), community CSG forums are one means of looking behind the official legal texts associated with CSG (e.g. statutes and case law) to shed light on how 'law is lived', imagined and experienced by members of a society (Chouinard, 1994: 432; Darian-Smith, 2013). Informal understandings of the law are central to social life, with legal practices and discourses forming part of how individuals frame and assert control over the world around them (Blomley, 1994; Schmidt and McDermott, 2015). Therefore, the participation of lawyers in CSG community forums is approached as a manifestation of a public desire for information about land use changes arising from this industry's expansion, presenting opportunities for lay perceptions of the law to be expressed by communities and for arguments about the use of landscapes to be aired to lawyers (Chouinard, 1994). In sharing their legal knowledge with clients, lawyers exercise their professional identity (Brigham, 2009). As participants in CSG forums, however, lawyers not only actively disseminate their knowledge and translate the law for a public audience, but also share their experiences and personal values as key negotiators in land access disputes associated with CSG development. As privileged legal actors, they may seek to exert influence on those attending forums, filtering legal information and opinions to audiences through the lens of their own lives and social values (Martin et al., 2010). Judges and lawyers are specialists in communicating the law to the broader community, spending a significant amount of their professional lives speaking and writing about the law. As a result, they also have an important influence on how non-expert members of the community understand the law (Howe, 2008). In focusing on community forums, a type of informal legal commentary on CSG in Australia is examined that is not discussed by Turton (2015), while also offering one means of redressing the general absence of lawyers from the legal geography literature (Martin et al., 2010). The above discussion highlights the value of studying the contributions of lawyers to extractive industries and suggests that community interactions with lawyers at public

forums can be used to assess the translation efforts of these key legal actors. This is detailed further in the next section.

#### 4. Community forums

##### 4.1. Background

Significant content themes at the six recorded forums noted above in Section 2 related to land access, environmental regulation, opportunities for public participation in decision-making and arbitration. The emphasis of most of the forum presentations by lawyers was on describing and explaining the law surrounding CSG for the benefit of non-legal audiences. This is consistent with legal writing more generally (McGrath, 2010), and a reflection of the fact that lawyers are the product of a school of legal thought known as Legal Positivism. This jurisprudential concept encourages law students and lawyers alike to distinguish between what the law 'is' and what the law 'ought' to be (McGrath, 2010). While this philosophy is evident to varying degrees in the presentations of some forum presenters (Centre for Rural Regional Law and Justice Deakin University and the Environmental Defenders Office, 2014; Conservation Council SA, 2011), it does not prevent the expression of personal views. For example, when providing a brief survey of the legal framework for CSG in Queensland for an environmental justice symposium, one member of the EDO opened their presentation with the comment that: 'I don't agree with it...but this is what it is and that's how I'm going to set it out today' (Hamman, 2012).

Given that the six recorded community forums located by the researcher all fail to include lawyers from the CSG industry on their panels, it should be said that critical viewpoints are expressed about the CSG industry in many of the opinions presented by lawyers and forum audience members. Indeed a lack of industry participation in one forum was pointed out to the press by the Australian Petroleum Production and Exploration Association (an industry lobby group) prior to being held, despite an open invitation seemingly being extended to the CSG industry by the event organisers (Thomas, 2014; Independent Coal Seam Gas Science Forum, 2014). Several of these forums were arranged by non-government environmental organisations and/or anti-CSG social movements. It is therefore to be expected that the views expressed at these events are somewhat reflective of the values espoused by those social movements. The personal politics of the lawyers taking part in the forums is also relevant, since a lawyer's social values may find expression in the type of legal practice they pursue and in turn be reflected in the organisation they work for (Willow et al., 2014; Smith, 2006). This was usually acknowledged by the presenters. For example, Kirsty Ruddock, then a New South Wales EDO solicitor, noted at the outset of her presentation that:

What I'm going to talk to you today about is...the state of the law, but you have to bear in mind that I do have a perspective on this. Because obviously we are a legal centre that's about improving environmental outcomes. [National Parks Association of NSW, 2011a]

It is worth noting that the EDO does not have a monopoly on informing individuals about CSG laws, with the assistance of lawyers being remarked upon by members of government inquiries, who utilised their expertise during deliberations over possible regulatory directions for CSG in both Queensland and New South Wales (New South Wales Parliament Legislative Council, 2012; Queensland Land Access Review Panel, 2012). Of course, contributions from lawyers towards proposed CSG regulatory matters are not always welcomed by government (Queensland Parliamentary Debates, 2014: 3017, 3018–19). Some community forums were arranged jointly between the EDO and universities

(Australian Earth Laws Alliance, 2012; Centre for Rural Regional Law and Justice Deakin University and the Environmental Defenders Office, 2014), in what is arguably the continuation of a historical connection between higher education institutions and community legal centres in Australia that has existed since the 1970s (Noone, 1997). Lawyers participating in the community forums were also generally quick to acknowledge gaps in their expertise and experience with CSG. For example, during the unconventional gas forum convened by the Deakin University Centre for Rural Regional Law in March 2014, Glenn Martin of Shine Lawyers provided a snapshot of Queensland's CSG land access laws then stated that:

[F]rom a landholder's perspective – and that's who I act for, I don't act for any mining companies or CSG companies – I'm reasonably comfortable with the way the legislation is at the moment. [Centre for Rural Regional Law and Justice Deakin University and the Environmental Defenders Office, 2014]

While these forums were organised independently of each other and largely as a means of bringing community members together to improve both legal and non-legal knowledge of CSG, legal information and arguments provided by lawyers at these forums had relevance to people far beyond the immediate audience at a particular community event. Calls for law reform by lawyers presenting at these community events can be appreciated in this light.

##### 4.2. Land access

Frequent acknowledgement is made in all of the forums to the Crown's interest in CSG resources in Australia, namely that: the State is the title holder of the land on which CSG is extracted, owns the resource itself, may receive royalties for its extraction and is responsible for any environmental protection and socio-economic measures needed to protect the larger public interest from any negative consequences resulting from its development (Alfredson, 1987; Boule et al., 2014). The State also adjudicates between these interests. Thus, when asked by a forum audience member in 2012 about possible mechanisms for resisting CSG exploration on their property, Sue Higginson, the Principal Solicitor for the New South Wales EDO, conceptualised her response not in terms of the individual's particular allotment of land or local circumstances, but through the spatial prism of the State and its jurisdiction in such matters. This generalised approach was also adopted by other solicitors at CSG forums (e.g. National Parks Association of NSW, 2011a; Conservation Council SA, 2011). Beyond simply noting that minerals are exploited for the benefit of all Australians by the Crown, Higginson noted one potential counterargument against CSG development under current legislation that underscores the State's multiple interests in mineral resources:

I would be saying at this point, trying to be a creative lawyer if there's such a thing...[that] the community is saying it's not to our benefit and therefore the New South Wales State Constitution [Act 1902]...that gives the New South Wales parliament all of its kind of powers to make laws...says [in section 5 of the Act] "for the good government" and "for the good of the New South Wales people". And we are saying, or the New South Wales people are saying that...right now the Petroleum (Onshore) Act [1991 (NSW)] is 100% not for the good of the New South Wales people – so I mean there are arguments in there. [Clarence Environment Centre, 2012]

Picking up on this reference to the New South Wales State Constitution in the same forum, a subsequent question was asked by another audience member as to whether there was a contradiction between that statute's grant of power to make laws



for the good government of the people of New South Wales and the [Petroleum \(Onshore\) Act 1991 \(NSW\)](#), which enables the extraction of CSG, and was it therefore ‘anticipated that there [would be]... a legal challenge to set some sort of precedent in this regard?’ After clarifying that her earlier comments were not in reference to the Constitution of the Commonwealth of Australia, but rather the New South Wales Constitution Act, Higginson cautioned that:

[T]he short answer would be no. I don't know of any argument that would have enough merit, that would experience enough prospects of succeeding [in litigation proceedings]... [W]hile we may be in a room of people that understand that the consequences of coal seam gas right now are probably very, very detrimental to the environment – what we also are dealing with is a community and a government and policy that thinks that coal seam gas extraction is in the interests of the New South Wales community somehow. Because it will be raising revenue, it is like the way we see mining. [[Clarence Environment Centre, 2012](#)]

These exchanges provide an example of what [Martin et al. \(2010\)](#) have described as one of the principal tasks of lawyers: translating the particular concerns and meanings of others (whether clients or other parties) into useable legal arguments, giving new meaning to the information they receive in the process, or at least attempting to do so in the above instance. Higginson presented the Crown's ownership of mineral resources as the political and legal status quo, but noted a vague argument in support of the audience member's question of a legal challenge through the New South Wales Constitution, despite holding a pragmatic view of its limited potential for success in litigation. The governance of social conduct by the law is linked with how people perceive social spaces ([Herbert, 2014](#)) and lawyers may view community understandings of rural places as incompatible with the laws surrounding CSG, as described by audience members at community forums and elsewhere. The fact that Higginson mentioned the New South Wales Constitution Act as a possible legal argument, however remote, engages with the question of how communities grapple with notions of place and translate those legally unstable ideas into not only legal rhetoric, but perhaps also legally plausible actions ([Martin et al., 2010](#)). Despite having little prospects of litigation success, the vexed political issue of CSG land access and State powers to grant licences for CSG extraction has continued to be visible in the public debate, with attempts being made to change mineral resource ownership through legislation at the national level. At the time of writing, public submissions were being received for a proposed [Landholders' Rights to Refuse \(Gas and Coal\) Bill 2015](#), introduced by Senator Larissa Waters, a member of the Australian Greens party. The Bill is intended to provide Australian landholders with the right to refuse the commencement of unconventional gas and coal mining activities on their land without prior written authorisation ([Senate Standing Committees on Environment and Communications, 2015](#)). Whether or not the Bill is passed (similar proposals have failed to enter into law previously, e.g. [Landholders' Right to Refuse \(Coal Seam Gas\) Bill 2011](#)), lawyers provide an important educational service in correcting misplaced public understandings of land ownership in Australia at community forums and elsewhere ([Boulle et al., 2014](#)).

While informing forum audiences about the nature of Crown ownership of mineral resources is a significant aspect of all the forums, combining descriptions of the law with personal experiences is also common. Doing so may also give rise to questions of space, law and power. An example of this can be found in the discussion given over to arbitration processes by two CSG forum speakers at the Independent Coal Seam Gas Science Forum held in the New South Wales parliament in 2014. Two speakers

raised concerns that some CSG companies had allegedly sought to prevent lawyers from taking part in the arbitration process with landholders. Arbitration arises when the holder of a CSG exploration licence and a landholder are unable to agree on the terms of an access agreement and therefore turn to an arbitrator to determine an appropriate arrangement between the parties, as without this agreement exploration cannot proceed ([New South Wales Trade and Investment Resources and Energy, 2015](#)). The arbitrator will impose a decision as to the contents of a land access arrangement (i.e. access routes, types of activity to be permitted, duration of agreement, financial compensation, environmental protection measures and so on), having regard to the arguments of the parties. If however a landholder rejects the arbitrator's decision, a final appeal can be made in the New South Wales Land and Environment Court ([New South Wales Trade and Investment Resources and Energy, 2015](#); [Petroleum \(Onshore\) Act 1991 \(New South Wales\)](#), ss 69F, 69L, 69M, 69N).

Legal representation during arbitration requires the consent of all parties ([Mining Act, 1992 \(New South Wales\)](#), s 146; [Petroleum \(Onshore\) Act 1991 \(New South Wales\)](#), s 69I). Sue Higginson contended at the [Independent Coal Seam Gas Science Forum \(2014\)](#) that:

[T]he experience at the moment is that some of the companies are not agreeing to landholders having a legal representative to assist them. So you might find that you as the landholder are sitting in a room arbitrating with an extremely experienced... well qualified... CSG exploration company.

Endorsing Higginson's suggestion of a power imbalance, Ian Coleman SC, a legal representative for landholders impacted by CSG, argued that procedural fairness was put at risk in landholder-explorer arbitrations when some parties were told ‘it would be better if we kept the lawyers out of it’ ([Independent Coal Seam Gas Science Forum, 2014](#)). Procedural fairness is a central tenet of Australian administrative law and is concerned with the right to a fair hearing and the right to an unbiased decision ([Head, 2012](#)). Coleman claimed that:

[R]ecently we had an experience where... we were led to believe that the company would go along with our clients being legally represented. [W]e outed ourselves and instead of a letter from the lawyers, we got one from the environmental manager... of the company [suggesting that the lawyers be excluded]... [T]he lawyers are only literally kept out of the room where the arbitration is happening. Everything else is orchestrated by lawyers... So right from the start if you have any concept of procedural fairness, natural justice, broader concepts of justice, you become fairly nervous about this whole process. [[Independent Coal Seam Gas Science Forum, 2014](#)]

While specific statements countering the above criticisms from Higginson and Coleman are lacking, one lawyer has argued that complaints about the conduct of CSG operators in relation to land access more generally ‘can sometimes be an attempt by landowners to increase compensation payments’ ([Nunan, 2008: 41](#)). The CSG industry, in New South Wales at least, has also taken steps to ease land access concerns with its ‘Agreed Principles of Land Access’ signed between AGL, Santos, NSW Farmers, Cotton Australia and the New South Wales Irrigators Council ([Fulcher and Eaton, 2014](#)). It is also notable that legislative proposals designed to increase legal representation at arbitration have not been well received by the New South Wales Minerals Council (an industry lobby group), which suggests that such a move could transform the process into a ‘pseudo court hearing’ ([2014: 9](#)). The Council views this as an unhelpful development, believing that ‘arbitration has been used as a tactic [by some landholders] to delay and add cost to an exploration program’ ([New South Wales](#)

Minerals Council, 2014: 9). Coleman's contention that the exclusion of lawyers damages the prospects of procedural fairness relates to the perceived fairness of decision-making processes (Gross, 2014) and taps into a larger debate as to whether or not lawyers are necessary to ensure that 'justice', procedural or otherwise, is done – a question which has been debated for many decades by law and justice scholars (Denning, 1955; Economides et al., 1986; Gross, 2014; Sackville, 2014; Delaney, 2015).

Arbitration is a legal mechanism for ensuring that land access agreements are reached between CSG operators and landholders, the legally enforceable decisions of arbitrators ultimately helping to shape both the physical and economic geographies of landscapes (Platt, 2014). Yet the physical spaces in which the arbitration occurs may also constitute a legal geography, with the presence of lawyers arguably creating an atmosphere where power, procedures, legal authority and credentials are projected on to those taking part – in much the same fashion as formal courts (Jeffrey and Jakala, 2014). Clearly there are differences of opinion as to the appropriateness of an increased role for lawyers in arbitration proceedings. Although Martin et al. (2010) refer to a lawyer's capacity to exert power over others to resolve a client's problem, the absence of these legal actors may result in another type of power shift, noted in the literature on a larger scale in the limited legal capacity of developing nations to bargain effectively with multinational corporations (Kolstad and Søreide, 2009). Whether or not the use of lawyers during arbitration results in positive outcomes for all participants, the criticisms of Coleman and Higginson appear to have been acknowledged by government and the New South Wales Law Society (2014). Amendments proposed for the New South Wales parliament in 2015 may alter the statutory arrangements that currently require both parties to consent to legal representation during arbitration (New South Wales Trade and Investment Resources and Energy, 2014), a change originally recommended in a review of the New South Wales mining arbitration framework (Walker, 2014). Such a change could address some of the concerns to which Coleman in particular has referred on several occasions (Coleman, 2014a,b; Foley, 2014; McCarthy, 2014).

By bringing attention to the role of lawyers in arbitration proceedings at the beginning of the community forum, Higginson and Coleman reinterpret the concept of arbitration from a purely necessary step in a land access negotiation process in New South Wales, to a conflict over procedural fairness, explaining the law yet also critiquing it for the forum audience by discussing their personal experiences with arbitration proceedings. Yet, as noted in Section 2, an absence of CSG industry viewpoints in the forums discussed highlights a need for caution when weighing opinions about CSG – as clearly negotiation experiences will differ between landowners for various reasons (Liss, 2011). This can also be seen in the context of other extractive industries in Australia (e.g. O'Brien, 2015). Because forums present opportunities for exchanges of ideas and information in relation to CSG, it is worthwhile examining some of the possible motivations that may have led these lawyers to participate in these events, noting that unconventional gas attracts a wide range of stakeholders – some of whom wish to implement changes to the laws governing it (Liss and Murphy, 2014).

As noted in Section 1, lawyers act as agents for others and exert power over others as socially privileged actors (Martin et al., 2010). The lawyers who presented at the CSG forums discussed above appeared to be motivated by the desire to raise law reform concerns and to educate the community about the legal frameworks surrounding CSG (e.g. National Parks Association of NSW, 2011a). Although not discussed in the recorded forums, larger contextual issues associated with lawyers engaged in CSG matters should be acknowledged, as these may have some bearing

on the views that were expressed in the recorded community forums. The fact that some Australian law firms deliberately highlight their 'CSG law experts' for advertising purposes (e.g. Oliver, 2014; Shine Lawyers, 2014; Donnie Harris Law, 2014; Ferrier and Co., 2014a,b; Emanate Legal, 2015) is potentially relevant when weighing up CSG commentary made by lawyers – as both community forums and media engagement may constitute opportunities to advertise their expertise rapidly and at small expense. One commentator has even suggested that small law firms could consider specialising in CSG as a 'quirky sub-area of law', in the interests of 'niching down' to increase their profits within a competitive market (Burton-Bradley, 2015).

The legal businesses associated with CSG are not necessarily small, however, and there have been opportunities for some leading law firms to significantly expand their services in this practice area (Whealing, 2011; Mezrani, 2014; Chaffrey, 2012). This is not a criticism of lawyers and their obvious need to operate effective businesses, but rather recognition of the complexities of public statements made by lawyers about CSG in Australia. It is both simplistic and unhelpful to resort to caricatures of lawyer motivations – the self-serving propagator of litigation, the larger-than-life public interest advocate or the 'neutral technician' bringing "legal" drafting and advocacy skills to bear in solving client problems – as these are already prominent in socio-legal studies and popular literature (Sugarmann, 1994: 123).

But such images can serve to highlight gaps and silences in the voices of lawyers speaking publicly about CSG, as these are not always acknowledged in media coverage or indeed at CSG community forums. For example, in 2010, Peter Shannon (a prominent CSG commentator and solicitor from Shine Lawyers acting for landholders) drew attention to what he believed were membership links between legal firms acting for CSG companies and the Queensland Resources Council (a mining industry lobby group), suggesting that many law firms were financially bound to the CSG industry's future. While his assessment may be based on reasonable observation, it is also partial, as he did not mention his employer's financial stake in the industry's expansion (Scott, 2010). In the absence of a financial incentive, lawyers may use the media and community forums to air political opposition to CSG. This was acknowledged by Sue Higginson in a community forum in 2012:

[T]he rights of a landholder [to prevent CSG exploration]...are...subservient to the rights of a company that has the grant of a...coal seam gas title...For that position to change, the law needs to change...Clearly what we have, and I said it tonight on Channel 7 News...[is a] law that has allowed...coal seam gas companies to race ahead of the thought of landholders and the environment. [Clarence Environment Centre, 2012]

Further analysis of other forums aimed at both the CSG industry and the broader community would no doubt reveal additional information as to the motivations of participants. Martin et al. (2010) certainly discuss how lawyers translate the anxieties of clients into useable legal claims and exert influence over others by combining legal principles with personal values. But it would also be worthwhile investigating how the opinions of lawyers are used by communities themselves to craft messages both for and against the CSG industry's operation. For instance, legal advice received by a local government council in New South Wales regarding its ability to prevent CSG operators from using council-owned roads was publicly reported in the local newspaper less than a month before residents voted on whether the community supported CSG exploration and production within council boundaries (Harlum, 2012; Luke et al., 2013, 2014). The role of lawyers in shaping community views and perhaps driving legal empowerment in regions connected with the CSG industry could be a subject for future research.

## 5. Conclusion

From the information presented above in six community CSG forums, it has been shown that lawyers are a key constituency in Australia's CSG discussions and are regularly utilised in both forums and the media to provide information about the legal ramifications of CSG to the wider community. In Section 2, the glaring absence of CSG industry lawyers from the available recorded CSG forums was noted as problematic for a full assessment of the profession's participation in this setting. Drawing upon legal geography literature to approach the forums as informal engagements between lawyers and members of the general public, opinions expressed by lawyers at community forums were found to contain both descriptions of the legal process and personal reflections on their experiences as legal actors involved with this resource.

In engaging with audience members on questions about the Crown's ownership of mineral resources, land access arrangements and arbitration, lawyers acted as legal educators and moulded community concerns into workable legal claims. Lawyers also attempted to exert influence over forum audiences as bearers of legal knowledge, seeking law reform on CSG matters. In critiquing CSG legal arrangements, lawyers shape community understandings of physical places and give voice to issues of power and exclusion. Beyond a desire for law reform and political concerns, financial and advertising motivations for the participation of lawyers in both media and forum CSG commentary were acknowledged as potentially relevant. It is to be hoped that future CSG research will consider lawyers in greater depth, in view of the scope of their involvement with this controversial energy source.

## Acknowledgements

This research was funded by an Australian Government Postgraduate Award Scholarship and a Supplementary Scholarship from the Fenner School of Environment and Society, Australian National University. Interviews conducted by the author were carried out with the approval of the ANU Human Research Ethics Committee, protocol number 2014/433. I wish to thank Professor Stephen Dovers, Associate Professor Karen Hussey and Dr Thomas Measham for their helpful suggestions on earlier drafts of this manuscript. I am also grateful to the interviewees for their insights and time.

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## **Appendix 4: Published version of Chapter Six – Legal determinations, geography and justice in Australia’s coal seam gas debate**

The published version of David J. Turton, 2017, ‘Legal Determinations, Geography and Justice in Australia’s Coal Seam Gas Debate’. In A. Lukasiewicz, S. Dovers, L. Robin, J. McKay, S. Schilizzi and S. Graham (Eds.), *Natural Resources and Environmental Justice: Australian Perspectives*. CSIRO Publishing, Clayton South, Victoria, pp. 155-167 is reproduced on the following page.

## Legal determinations, geography and justice in Australia's coal seam gas debate

David J. Turton

### Summary

Social and environmental justice issues loom large in Australia's coal seam gas (CSG) debate. This chapter will draw on relevant Australian judicial decisions and related literature to show how aspects of procedural and distributive justice have arisen for a variety of stakeholders associated with CSG extraction. Noting that social justice questions have been considered by geographers in the past and that aspects of spatial justice figure prominently in the work of legal geographers, this chapter focuses on the spatial and temporal features of CSG in Australia from an environmental and social justice perspective – using court judgments as short, illustrative case studies. Because both law and landscapes are shaped by contests over what is deemed just and unjust in society, this chapter also responds to recent calls for greater attention to justice questions by legal geography and justice scholars.

### Introduction

Coal seam gas (CSG) is a regular feature of Australian newspaper headlines and is a politically charged topic for many communities, particularly in Queensland and New South Wales (e.g. Manning 2012; Munro 2012; Sherval and Hardiman 2014). Calls to expand this industry, which involves the extraction of methane from underground coal seams, have been driven partly by arguments that the adoption of CSG is a necessary step towards reducing fossil fuel emissions in the wider context of combating anthropogenic climate change (Lacey and Lamont 2014). It is notable that research into the possible greenhouse benefits of CSG over more conventional fossil fuel sources (such as oil and coal) remain ongoing against a need for greater consistency in the environmental impact assessment of CSG projects in Australia (Vickas *et al.* 2015). The potential of unconventional gas (encompassing CSG, tight gas and shale gas) to serve as alternatives to coal and oil in a lower carbon emitting energy future has also been questioned (e.g. Stephenson *et al.* 2012). The anti-CSG social movement Lock the Gate has sought to challenge the political support that exists for this industry by drawing attention to private property rights, the potential of CSG to threaten the economic viability of productive farming land and the ability



of farmers to determine whether or not the industry should proceed on an individual's land (Colvin *et al.* 2015). Support for Lock the Gate's position exists among some federal politicians (e.g. ABC News 2015c), but as approvals for CSG developments lie largely with state governments, calls by these individuals for a farmers' right to 'say no' to CSG have been described by one commentator as politically opportunistic 'flip-flopping' (Windsor 2015: 193).

Other criticisms of the CSG sector relate to potential risks to water aquifers, above-ground spills of so-called 'produced water' arising from the extractive process (including 'fracking'), fugitive methane emissions, and the possibility of cumulative risks to ecosystems caused by necessary infrastructure such as roads and pipelines (e.g. Tan *et al.* 2015). It is important to note that the CSG industry is not without its supporters in rural and regional Australia, with some commentators arguing that CSG represents an economic boon to communities with potentially positive socio-economic impacts (e.g. Office of the Chief Economist 2015; Gribbin 2015; Schwartz 2015). In view of these contested perspectives, it is not surprising that notions of justice and fairness loom large in this community debate (e.g. Christie 2012; Munro 2012; Maloney 2014). Although Australia's CSG debate is certainly played out in urban centres – for example, through protests at sites of CSG extraction (such as AGL's Camden operation near Sydney in New South Wales, see Smith 2016) – arguments for and against the development of CSG revolve primarily around differing visions for the future of rural and regional Australia. Justice in this context is revealed in the tension between those who view CSG as a resource to be developed in the national interest – with potentially positive spill-over benefits into parts of rural and regional Australia – and those who fear that expanding this industry risks harming the future viability of existing agricultural business operations and the communities that exist around them. The challenge of finding an equitable path between these viewpoints remains ongoing. It is worth noting that arguments for and against CSG have been made against a larger background of declining populations, reduced service provision, drought, economic restructuring and cultural divisions in rural and regional Australia (e.g. Gross 2015), with some people contending that CSG provides a means of reversing and ameliorating these losses. These divergent aspirations for the future are also present in the existing CSG litigation discussed below.

Focusing on judicial determinations relating to CSG necessarily means reducing the scope of the chapter, with an emphasis towards what Marcel Wissenburg has described as the *legal* aspects of justice – 'more or less synonymous with positive law' – rather than moral or normative elements of justice (quoted in Gross 2014: 24). Narrowing in on judicial determinations also runs the risk of categorising the judiciary as a coherent, unified body, which is not necessarily the case (Hammerslev 2005). Judges are not disinterested observers in the CSG debate either, but rather key actors who nonetheless claim to have a neutral stance on the contentious issues brought before them (Delaney 2010). In focusing on questions of justice in the realm of CSG-related litigation, it is noted from the outset that law and justice do not always intersect, yet have the capacity to do so – as observed recently by Ronald Sackville QC, a former Judge of the Federal Court of Australia (Sackville 2014: 1162):

*Law can be a powerful instrument of injustice, particularly in its impact on poor and vulnerable groups in the community. Yet law can also be a powerful force for the elimination or amelioration of injustice, especially through carefully designed legislative reforms supported by adequate mechanisms for their implementation.*

Australian litigation relating to CSG has involved not only government and anti-CSG community groups (e.g. *Fullerton Cove Residents Action Group Inc v Dart Energy Ltd* (No 2) [2013] NSWLEC 38; *Police v Rankin*; *Police v Roberts* [2013] NSWLC 25), but also CSG companies and their contractors (*AGL Sales (Qld) P/L v Dawson Sales P/L & Ors* [2009] QCA 262; *Saipem Australia Pty Ltd v GLNG Operations Pty Ltd* [2014] QSC 310). Such trends are replicated internationally and seem likely to continue (Preston 2014; Mulcahy 2015). Other cases have considered: freedom of information requests about the police response to anti-CSG protests (*Shoebridge v The Office of the Minister for Police and Emergency Services* [2014] NSWCATAD 189); the distribution of financial benefits of CSG to local government in the form of rates (*APT Petroleum Pipelines Pty Ltd v Western Downs Regional Council* [2014] QLC 18); and the use of fines as a deterrent following a failure to report environmental harm (*Connell v Santos NSW Pty Limited* [2014] NSWLEC 1). Not all of these cases can be considered here, nor are all of these judgments relevant to procedural and distributive justice – despite being indicative of a sometimes vitriolic community debate. An example of this can be seen in a recent defamation suit involving comments made by a talkback radio host about CSG and the then Deputy Premier of New South Wales, Andrew Stoner (*Stoner v Jones* [2015] NSWSC 585).

This chapter therefore draws upon relevant Australian judicial decisions to showcase how aspects of procedural and distributive justice have arisen for a variety of stakeholders associated with CSG extraction. By doing so, this chapter contributes to existing literature in the sub-discipline of legal geography and builds upon a growing interest in justice-related research in that field. Contending that these judicial cases are symptomatic of key themes in the wider CSG community debate (such as public participation), it is argued that the potential risks and benefits of CSG provide an opportunity to examine procedural and distributive justice issues in this public debate from various temporal and spatial perspectives, adding to existing geographical studies of environmental and social justice (Smith 1994; Cotton *et al.* 2014) – as well as emerging justice literature on unconventional gas more broadly (e.g. Fry *et al.* 2015; Ogneva-Himmelberger and Huang 2015; Clough and Bell 2016).

Going beyond a purely legalistic analysis of CSG court cases (e.g. Preston 2014), this chapter highlights the socio-political context that surrounds CSG litigation, because the court cases discussed are in many ways manifestations of larger themes in Australia's CSG discussion. Engaging with the existing domestic and international unconventional gas literature, it will be argued that Australian courts play an important role in driving improvements to stakeholder interaction and ultimately the quality of justice outcomes sought by various parties in the Australian CSG debate – despite their frequent reluctance to comment on the merits of CSG *per se*. A short clarification is necessary before canvassing the first judicial case study in this chapter. This concerns the concept of legal geography. For the purposes of this chapter, legal geography is approached as:

*[A] stream of scholarship that makes the interconnections between law and spatiality, and especially their reciprocal construction, into core objects of inquiry. Legal geographers contend that in the world of lived social relations and experience, aspects of the law that are analytically identified as either legal or spatial are conjoined and co-constitutive. (Braverman et al. 2014: 1)*

With a long tradition of commentators exploring the connections between law and justice (Kearns and Sarat 1996; Sackville 2014), it is not unsurprising that legal geographers

have also delved into the realm of justice, often by examining spatial injustice and the law's role in constraining and enabling such power dynamics (Delaney 2016). Law and landscapes are shaped 'by contestations over what is considered just and unjust in different societies' (Jones 2006: 1). Indeed many legal geographers seek to engage with 'systemic *asymmetries* of power, such as domination, exploitation, and marginalization both in the world and with respect to access to law' (Delaney 2016: 268; see also Silbey 2001). The two key aspects of justice to be considered below are procedural and distributive justice. An early instance of procedural justice issues emerging in the context of CSG can be seen in the *Baker* decision, analysed below.

### **Procedural justice: *Baker v Minister for Employment, Skills and Mining & Another***

Legal meanings are projected on to 'every segment of the physical world' (Braverman *et al.* 2014: 1). These meanings are not fixed, but are instead shaped and reshaped by 'contested social practices and material realities' (Jepson 2012: 616). As an element of the legal process, litigation has a significant role to play in creating spaces, through judicial interpretations of time and geography (Benson 2014). Discussions of space are also relevant in negotiations between landholders and CSG companies, particularly where it serves as grounds for judicial review of government decision making. In 2011, QCLNG Pipeline Pty Ltd was engaged in negotiations with the Eidsvoid grazier Michael Baker to install a CSG pipeline across a portion of his property in the North Burnett region of Queensland. This was part of QCLNG's plan to construct a CSG pipeline from the Surat Basin to the industrial port of Gladstone in central Queensland. QCLNG's failure to provide Baker with an appropriately scaled map of the property that would be used for the pipeline was found to be a denial of procedural fairness. Procedural fairness is a fundamental concept of Australian administrative law and is premised on the idea that a person who might be adversely affected by an administrative decision must be given a fair hearing before a decision is made. In this case, procedural fairness required that QCLNG provide Baker with sufficient information to be able to participate meaningfully in the decision-making process with the company and also be permitted a reasonable opportunity to respond to QCLNG's pipeline application before a decision was made by the Queensland Department of Natural Resources and Mines. In her findings, Justice Jean Dalton observed that:

*Remarkably enough, the application lodged on behalf of QCLNG did not contain a precise description of the land over which ... permission [for access] was sought, either in words, or in the two maps which were part of the application ... The realigned pipeline was nowhere shown on the material in the application and the map showing the original pipeline was at such a scale as to be meaningless to someone trying to ascertain where exactly the proposed pipeline land would run over Mr Baker's property (Baker v Minister for Employment, Skills and Mining & Another [2012] QSC 160).*

Because Baker lacked a precise map of QCLNG's pipeline route and was not given accurate mapping information in sufficient time to respond to QCLNG's application to the Department (only being informed of the modified scale arrangements proposed by QCLNG a mere 2 days before the 28-day statutory notification period expired), Justice Dalton concluded Baker did not receive procedural fairness. As a consequence, she ruled

that the Department's decision to grant QCLNG access in that particular location was void (*Baker v Minister for Employment, Skills and Mining & Another* [2012] QSC 160). In this instance, judicial understandings of time and space converged to create legal consequences for QCLNG and Baker (Turton 2015a). Scale is, of course, a politically constructed concept and its use in the legal arena is frequent, particularly in relation to matters of jurisdiction (Valverde 2009). Following Justice Dalton's decision, QCLNG claimed that their application failed on a mere 'technicality' (Gribbin 2012), but since this decision was handed down, no similar cause of action has yet been pursued by a landholder against a CSG company – suggesting that CSG operators have learned from the experience and become far more cautious in providing accurate geographical information to those with whom they are seeking to negotiate access for pipeline purposes and beyond.

Similar issues regarding the adequacy of geographical information arose before the Baker decision in *O'Connor & O'Connor v Arrow (Daandine) Pty Ltd* [2009] QSC 432, when an entry notice for the construction of a CSG water treatment pipeline was found to be void for failing to give sufficient particulars to a landholder. As Geritz *et al.* (2012) warned:

*Given the conclusions in [the] Arrow Daandine and Baker [judgments], project proponents should be very careful in the descriptions that they provide to owners (and occupiers where relevant) in notices (including negotiation notices, Consultation Notices and notices of entry) under the various pieces of resources legislation. The lack of such precision could result in the notice being found to be void and the activities subsequently conducted being unlawful.*

A greater attention to land access information by CSG companies has perhaps also been encouraged by wide coverage of Justice Dalton's decision in Baker, both within legal circles and the press (e.g. Geritz *et al.* 2012; Hairsine and McCarthy 2012; Wilson and Jacques 2012). The above cases consider aspects of procedural justice in a geographical context, whether in terms of open and transparent information-sharing or allowing sufficient time for stakeholders to reach a considered decision. It is stressed that legal commentary on procedural justice as it relates to CSG in Australia has not been limited to the courts and professional journals, but can also be found in less formal settings, including CSG community forums that have featured lawyers as presenters on speaker panels (Turton 2015b).

Despite their importance in improving justice processes and outcomes, judges have emphasised their limited capacity to resolve the larger community debate surrounding CSG, as observed by Justice Pepper of the New South Wales Land and Environment Court:

*Coal seam gas is contentious. This judgment will, however, do little to quell the current anxiety surrounding the coal seam gas mining debate. In this regard it must be understood that the merits, or otherwise, of the use of this resource are irrelevant to the issues raised for determination by these judicial review proceedings, concerning, as they do, only the lawfulness of the approval under challenge (Barrington-Gloucester-Stroud Preservation Alliance Inc v Minister for Planning and Infrastructure [2012] 194 LGERA 113).*

This is not to suggest that the judiciary has been blind to the political undercurrent that surrounds CSG. Indeed, in one case concerning a vexatious prosecution launched by the New South Wales police against two anti-CSG protesters in 2013, the presiding magistrate

strongly criticised the role of politics as a potential source of interference with proper criminal justice procedures and a waste of the court's time and resources (*Police v Rankin; Police v Roberts* [2013] NSWLC 25). This privileged arm of the legal profession has also been required to consider geographical questions in relation to particular spaces, which can indirectly influence the community debate. The law is bound up with space in surprising ways and this extends to the ways in which spatial tactics are infused with legal terms and offences. Criminal law, for instance, is filled with prohibitive measures designed to inhibit movement through space – indeed criminal offences such as homicide are laden with spatial and temporal features (e.g. Sylvestre *et al.* 2015), particularly in setting out the requisite elements needed to establish a criminal act (Farmer 2010).

Spatial and legal interplay can be seen in the types of relief sought between CSG operators and community group litigants: for example, the seeking of an injunction (a remedy long associated with the restraint of behaviour in particular places, Blandy and Sibley 2010) by an anti-CSG community group, so as to prevent a CSG operator from constructing infrastructure required for a pilot exploration program until substantive legal arguments about the environmental impacts of the proposal could be heard (*Fullerton Cove Residents Action Group Incorporated v Dart Energy Ltd* [2012] NSWLEC 207). In granting the injunction, Justice Sheahan ordered a temporary halt to the potential physical and economic geography of the exploration site (Platt 2014). This freeze on exploration activity was subsequently lifted on appeal (*Fullerton Cove Residents Action Group Inc v Dart Energy Ltd (No 2)* [2013] NSWLEC 38), but the proponent, Dart Energy, ceased exploration work in 2013. At the time of writing, the CSG licence for this region remains current, with some residents of Fullerton in the Lower Hunter Valley region suggesting that the New South Wales Government should cancel the licence following the expiration of a CSG licence buyback scheme instituted after community backlash against the CSG industry in that state (ABC News 2015a). Another important case concerning matters central to procedural justice in CSG decision making was the decision of Justice Button in *Metgasco Limited v Minister for Resources and Energy* [2015] NSWSC 453. This judgment (and its aftermath) poses particular questions about the nature of public participation: a core tenet of procedural justice.

### **'Effective' consultation: *Metgasco Limited v Minister for Resources and Energy***

Metgasco was a CSG company that held a licence for petroleum exploration at Bentley in the New South Wales North Coast region. This licence was initially issued under the *Petroleum (Onshore) Act 1991* (NSW) in November 1996. After presenting a CSG exploration program to the responsible Minister for Resources and Energy in March 2013, a delegate of the Minister approved the company's exploration plans on 6 February 2014. The CSG exploration licence related to a drilling site known as Rosella Well, located on freehold private land within a former gravel quarry. Approval for the licence was partly contingent upon Metgasco demonstrating adequate community consultation efforts, in addition to preparing the site sufficiently for exploration purposes. Despite Metgasco's efforts to engage the community, community opposition to CSG at Bentley remained strong – with public demonstrations at Metgasco's drilling site before the New South Wales state election. On 14 May 2014, the Minister's delegate, Rachel Connell, informed Metgasco of her decision to suspend operations at the Rosella site under section 22 of the *Petroleum (Onshore) Act*, due to an alleged failure by Metgasco to fulfil conditions to their CSG



licence. Specifically, Rachel Connell determined that Metgasco had breached a New South Wales Strategic Regional Land Use Policy Delivery guidelines, entitled 'Guidelines for community consultation requirements for the extraction of coal and petroleum, including coal seam gas' ('the Guidelines'). Connell contended that Metgasco had failed in its community consultation obligations under the Guidelines, developing a 'defeatist attitude' to community consultation and claimed that Metgasco's representatives 'lacked the necessary skills to engage with an often hostile audience' (*Metgasco Limited v Minister for Resources and Energy* [2015] NSWSC 453). The court proceedings arose when Metgasco applied for judicial review of the Minister's decision to suspend their activities, after failing to secure an internal 'review' of the decision with the delegate concerned. Metgasco contended that the delegate's decision was unlawful and sought a declaration from the Court to this effect. The Guidelines stipulate that licence holders should seek to engage in 'genuine and effective participation', as 'an integral component' of their exploration activities (*Metgasco Limited v Minister for Resources and Energy* [2015] NSWSC 453).

Justice Button noted that Metgasco's consultation activities with the community included one-on-one meetings with landholders, letter box information drops, the signing of land access agreements, open community meetings in Casino and telephone communications to deal with concerns. Discussing the history of community opposition to CSG at the Rosella site, including the existence of a protest camp adjacent to drilling operations, Button observed that the Minister had not permitted Metgasco sufficient time to respond to the delegate's decision to suspend the Rosella licence, as required under the Act. Justice Button described the May 2014 suspension of Metgasco's licence as 'a bolt from the blue' as far as the company was concerned (*Metgasco Limited v Minister for Resources and Energy* [2015] NSWSC 453). The Minister contended that Metgasco had failed to engage in 'effective consultation' because, despite its community consultation program, widespread opposition to the Rosella project continued. On this point Justice Button took the view that:

*[A] reading of the guidelines as a whole shows that they are speaking of what is required in terms of the activities of the person or body engaging in consultation, rather than focusing on the results of the consultation upon the minds of the persons being consulted...[T]he guidelines are not prescriptive and ... have the tone of constructive suggestions rather than firm commands. And construing them as a whole, their reference to 'effective consultation' to my mind focuses on the quality of the process of consultation, rather than on any outcome whereby the persons who are the focus of the consultation are persuaded by it (*Metgasco Limited v Minister for Resources and Energy* [2015] NSWSC 453. *Emphasis in original*).*

Justice Button concluded that the delegate's decision to suspend Metgasco's licence had attached a substantial significance to anti-CSG community activism in the region, instead of focusing on Metgasco's efforts to consult with the community. In doing so, the Minister had given attention to an irrelevant consideration when reaching a decision about licence suspension. For these reasons, the suspension of Metgasco's licence was declared to be invalid. The *Metgasco* decision is significant for its examination of public participation as a key aspect of procedural justice, attending to the nature of proper decision making by government authorities who are faced with community protest over a controversial resource.

The case is also an illustration of how litigation can be used in large-scale community debates as an important testing ground for core concepts of justice, providing an

opportunity for all parties to re-assess their approach and perhaps improve community consultation and planning post-judgment. Litigation can be used as a means of giving authoritative expression to procedural justice principles (such as equity and fairness), allowing room for improved processes to support future interactions and improved outcomes between stakeholders (Lacey and Lamont 2014). Stakeholder anxieties leading up to a court case can also be allayed following a judgment, as shown by the *Metgasco* decision. Before Justice Button's findings were delivered, the Australian Petroleum Production and Exploration Association was concerned that the presence of protesters at a CSG site might mean that genuine community consultation could be construed as ineffective by government decision makers (McCullough Robertson 2015). Although litigation is not necessarily desirable in all cases, or indeed a stress-free exercise for those involved (e.g. Christie 2012), judges do provide crucial feedback on significant public issues – which can lead to improved processes and ultimately justice outcomes.

Following Justice Button's decision, Metgasco entered into compensation negotiations with the New South Wales Government for the expense involved in litigation and economic loss resulting from its halted exploration activities. The New South Wales Government offered Metgasco a A\$25 million settlement/buyback arrangement, in exchange for relinquishing its three Northern Rivers petroleum exploration licences – including its Rosella site (Metgasco 2015). This offer was presented to Metgasco's shareholders for a vote in December 2015, with Metgasco's board of directors unanimous in their support for the settlement offer (Metgasco 2015). The New South Wales Government took the view that the settlement was 'fair and reasonable', balancing 'the interests of NSW taxpayers and Metgasco's shareholders' (New South Wales Government 2015). Ultimately, the government's compensation offer was accepted by Metgasco's shareholders – who indicated the company would investigate future investment options outside New South Wales (ABC News 2015e). Beyond procedural justice questions and acting as a catalyst for further negotiation between different stakeholders, the courts have also delved into matters of distributive justice and it is to here that this chapter now turns.

### **Distributive justice: *APT Petroleum Pipelines Pty Ltd v Western Downs Regional Council***

As noted above in the introduction, support for CSG exists in communities that foresee economic and social benefits from the extraction of this resource. In the case of Australian local governments, opinions are divided as to the relative merits of CSG, with some local government authorities openly adopting an anti-CSG line (e.g. ABC News 2015b) – while others embrace the sector as advantageous to their community (Anonymous 2014). Presented with few legal powers with which to control CSG development, some councils have nonetheless found themselves embroiled in CSG disputes relating to town planning matters, such as a CSG wastewater storage pond (*Golder v Maranoa Regional Council & Ors* [2014] QPEC 68; *Westrex Services Pty Ltd & Anor v Maranoa Regional Council & Anor* [2014] QPEC 30). Yet even in places where there is strong support for the industry, the law can be used to dispute the value of landscapes associated with this resource, as was highlighted in the *APT Petroleum Pipelines* decision.

Ray Brown, Mayor for the Western Downs Regional Council in south-west Queensland until March 2016, has been prominent in the media as a strong supporter of the CSG industry – earning the nickname 'the Mayor for Mining' (Gribbin 2015). In September 2012, the Council resolved to modify their rate categories after adopting a 2012–13 Revenue

Statement (a document that established rate codes and categories for rateable land within the Council's boundaries) in line with section 104 of the Queensland *Local Government Act 2009*. Their decision impacted upon the company APT Petroleum Pipelines (APT), the operator of the Roma/Brisbane Gas Pipeline. Part of APT's operation included five gas compressor sites within the boundaries of the Council – infrastructure designed to facilitate the flow of gas to the pipeline. The Council categorised these five compressor sites in a rates notice issued to APT, defining these localities as 'Petroleum under 400 ha' – with land in this category intended for gas extraction or processing (or for purposes ancillary or associated with gas extraction or processing, for example, water storage and pipelines). In response, APT formally objected to the rates categorisations the Council had placed upon the five parcels of land relating to the gas compressors. An internal review of the rates decision by a delegate from the Council found no cause for re-categorisation in October 2014. This became the focus for an appeal to the Queensland Land Court. The question the Court faced was whether these compressor sites were appropriately categorised for rates purposes by the Council.

In court, APT argued that its compression stations were not 'CSG processing facilities' as the Council had zoned them. Instead, the company argued they should be zoned under the separate rates category of 'transport and storage' – which attracted a lesser fee. The Council countered by arguing that because APT was using the compressor sites for a pipeline that transported gas, it was a use associated with gas extraction and/or processing because the pipeline provided the means of transport of the gas from the extraction and processing locations to gas distributors and users. As an alternative argument, the Council countered that the use of the compressor sites was ancillary to gas extraction and/or processing, because the sites were incidental to and necessarily associated with gas extraction – the fact that APT did not itself extract and/or process the gas at the compressor sites was irrelevant in the Council's view.

Focusing on the question of whether or not the transportation of gas was ancillary or associated with gas extraction or processing, the Court concluded in March 2014 that APT's pipeline was a large structure and, as a matter of scale, not something readily thought of as ancillary or associated with gas extraction or processing. The Court accepted APT's argument that the activities performed at the compressor sites did not involve any refining or purifying of the gas that was supplied for transport by the pipeline. As a consequence, the Land Court found that the five gas compressor sites should be placed within the industrial transport/storage category for rate purposes (*APT Petroleum Pipelines Pty Ltd v Western Downs Regional Council* [2014] QLC 18).

From a distributive justice perspective, this case demonstrates that, even when local governments support CSG development, they may still turn to the law to attempt to secure what they believe to be a reasonable share of the economic benefits arising from the resource. Despite a costs order subsequently being imposed against the Council by the Land Court in August 2014 (*APT Petroleum Pipelines Pty Ltd v Western Downs Regional Council* (No. 2) [2014] QLC 27), there do not appear to be ongoing tensions between the Council and APT as a result of the legal challenge over rates. As Ray Brown later commented:

*I don't think there is going to be any long term broader implications of the court's decision ... These [CSG] companies have an impact on our region and we simply attempted to rate it accordingly, to cover the cost of using it and the future sterilisation of that area. (Anonymous 2014)*



Crucially, the *APT* judgment considered the distributive justice aspect of CSG in Australia, underscoring the fact that particular rural communities in Queensland and elsewhere have needed to respond to the impacts of CSG, both positive and negative, as a result of a broader state and national energy preference for the industry's expansion. The wider Australian population stands to benefit from CSG royalties, due to the Crown's ownership of mineral resources, but this has not been without cost for some local governments in CSG impacted regions. The manner in which local government authorities such as the Western Downs seek to distribute the burdens and benefits of CSG is an ongoing exercise – provoking questions of equitable treatment by state governments and drawing attention to whether or not local governments are appropriately equipped to bear both the burdens and economic prospects of CSG-driven development. Legislative changes that reduce the ability of New South Wales local governments to participate in planning matters associated with CSG activities are examples of ongoing challenges to local control by state governments (ABC News 2015d). The desire of the Western Downs Regional Council to seek a larger share of the economic benefits arising from CSG, in this case through a levy on the land occupied by CSG-related infrastructure, is therefore symptomatic of larger governance challenges facing Australian local governments in mining regions (e.g. Cheshire *et al.* 2014).

## Conclusion

There has yet to be a 'flood' of litigation surrounding CSG in Australia, but from the existing decisions it can be seen that procedural and distributive justice matters have arisen over this contested resource – whether the parties be landholders, social movements, CSG operators, contractors or governments. It can be expected that further judicial determinations will be made as this industry continues to expand, providing litigants with important opportunities to clarify their expectations of the CSG sector and attend to the larger social licence project confronting this industry in Australia. Future litigation may include elements currently missing from the corpus of cases covered above. An obvious example of this being landholder compensation. Although members of the Australian judiciary have been careful to avoid commenting on the merits of CSG in their findings, they are nonetheless powerful actors in this community discussion, with the capacity to demand more from community–company interactions through their rulings. Judicial determinations can draw upon geographical concepts to bring attention to justice processes and outcomes in the context of individual stakeholder disputes, thereby offering an important moderating voice in the ongoing community debate over CSG in Australia. Although uncertainties will remain in this national discussion – particularly given the differences between individual state laws surrounding CSG and their specific political proclivities – judgments from the courts can drive some positive changes to the negotiation dynamic between all parties in the longer term.

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